

*The Relevance of Judicial Decisions in International Adjudications: Reflections on Articles
38(1)(d) and 59 of the Statute and the Practice of the International Court of Justice*

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by

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ABSTRACT

In classical international law, States alone were the makers and subjects of the law. Times have changed. Contemporary international law admits, not only States as its subjects but also individuals and international organisations; it controls not just the needs of States but also the needs of individuals as it continues to venture into areas which, in the classical era, were exclusively reserved to domestic law. The fact that international law now applies to entities other than States is no longer a subject of controversy both in theory and practice.

On the contrary, the question relating to whether international law could originate from a source other than through the consent of States in the positivist sense of the law has remained a question of controversy. The question has been made more complex by the multiplicity of international institutions created by States and vested with authority to perform the functions entrusted to them under international law. The functions they perform influence the behaviours and expectations of both States and individuals; but the powers they exercise belong to the States which delegated the powers. Since the powers are delegated by States, it should follow that the powers be confined by the very fact of delegation to the functions for which the powers had been granted. Such powers cannot be used for any other purpose, perhaps.

With this in mind, the question sought to be answered in this work is whether the powers granted to International Court of Justice to “decide disputes” – article 38(1) of the Statute of the Court) – implicates the power of judicial lawmaking. In other words, whether rules and principles arising from the decisions of the Court can be properly referred to as rules and principles of international law. The question becomes quite intriguing when placed within the context of article 38(1)(d) and article 59 of the Statute of the Court on the one hand, and the practice of the Court and of the States appearing before it on the other hand.

Articles 38(1)(d) provides: “subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” By article 59: “The decision of the Court has no binding force except between the parties and in respect of that particular case”.

Notwithstanding the language of the above provisions, it is shown in this work that like judges in municipal law, judges in the ICJ lay down rules and principles having legal implications for the decisions in subsequent cases as well as for the conduct of States, in general, regarding areas within the degrees of the settled case-law of the Court. It is accordingly argued that to the extent that rules and principles in the decisions of the Court are relevant as rules and principles of international law (in subsequent decisions of the Court) to the determination of international law rights and obligations of States, judicial decisions in article 38(1)(d) are a source of international law. This is notwithstanding the unhelpful language of paragraph (d) and the influence of article 59. Concerning article 59, the writer argues that the article has no bearing on the authority of judicial decisions in article 38(1)(d); its real function being to protect the legal rights and interests of States from a decision given in a case to which they were not parties.

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Table of Abbreviations

All E.R – All England Report

All NLR – All Nigerian Law Report

A.B.A.J – America Bar Association Journal

AM. J of Comp Law – American Journal of Comparative Law

Am. J. Int'l L – American Journal of International Law

Am. J, Int'l L, Supp – American Journal of International Law Supplement

Am Soc'y Int'l L. Proc – American Society of International Law Proceedings

Aust. YBIL – Australian Yearbook of International Law

Brit. Y.B. Int'l L – British Yearbook of International Law

Brook. J. Int'l L – Brooklyn Journal of International Law

Cal. L. Rev – California Law Review

Cal. W. Int'l L.J ...California Western International Law Journal

Colum. J. Transnat'l L – Columbia Journal of Transnational Law

Colum. L. Rev – Columbia Law Review

CA – Court of Appeal

DJCIL – Duke Journal of Comparative and International Law

ECOWAS – Economic Community of West African States

ECHR – European Court of Human Rights

EJIL – European Journal of International Law

EJCL – Electronic Journal of Comparative Law

German L.J – German Law Journal

Harv. L. Rev......Harvard Law Review

HMSO – Her Majesty's Stationery Office

Int'l & Comp. L.Q – International and Comparative Law Quarterly

ICJ Rep – International Court of Justice Report

ITLOS – International Tribunal for the Law of the Sea

J. Comp. Legis. & Int'l L– Journal of Comparative Legislation & International Law

LQR – Law Quarterly Review

Mich. J. Int'l L – Michigan Journal of International Law

Mich. L. Rev – Michigan Law Review

NYU J Intl L & Polit – New York University Journal of International Law and Politics

PCIJ – Permanent Court of International Justice

QB – Queens' Bench

Tul. L. Rev – Tulane Law Review

Wash. L. Rev – Washington Law Review

Yale J Int'l L – Yale Journal of International Law

Yale L.J – Yale Law Journal

Chapter One

Introduction

These changes have underlined the importance of the Court's second function. For it now happens with greater frequency than formerly that, on a given topic, no applicable precepts are to be found, or that those which do exist present lacunae or appear to be obsolete, that is to say, they no longer correspond to the new conditions of the life of peoples. In all such cases, the Court must develop the law of nations, that is to say, it must remedy its shortcomings, adapt existing principles to these new conditions and, even if no principles exist, create principles in conformity with such conditions. The Court has already very successfully undertaken the creation of law in a case which will remain famous in the annals of international law (Advisory Opinion ... "Reparation for injuries suffered in the service of the United Nations").¹

The ICJ is a permanent international court with power of adjudication over claims submitted to it by States accepting its jurisdiction. Articles 7 and 92 of the Charter of the United Nations established the Court as its principal judicial organ. The Charter is supplemented by the Statute of the Court which is annexed to the Charter as an integral part thereof.² It is the successor to the Permanent Court of International Justice (PCIJ) established under the League of Nations Covenant, except that the Statute of the ICJ, unlike that of the PCIJ, is annexed to the Charter of the United Nations.³ The functions and procedures of the two Courts are the same.

By its Statute, the Court performs two main functions: the first is to settle legal disputes submitted to it by States; the second is to answer legal questions submitted to it by organs permitted to do so. In addition to these functions expressly granted by its Statute, the Court performs a general lawmaking function as an incidence of its law-application function. In a

¹ Separate Opinion of Judge Alvarez in *Fisheries case* (United Kingdom and Norway), ICJ Rep 1951, 116, 146. Judge Alvarez was alluding to "the rapid and profound changes in international life", which followed the end of the Second World War. These changes, no doubt, include the liberalisation of the domain of international law in the areas of human rights; the emergence of powerful international organisations and the supranational application of international law. The Judge thought these changes "greatly affected the law of nations".

² Article 92 of the Charter

³ *Ibid*

very significant way, this lawmaking function assists the Court in the performance of the aforementioned dual functions bestowed on it by its Statute. This, as explained in the body of this work, is because the Statute mandates the Court to perform its functions in accordance with international law (as contained in its article 38(1)), within a legal sphere that lacks a central legislature, resulting in inadequate legislative interventions. This necessarily results in gaps in the law the Court shall apply.

The lawmaking function of the Court finds some formal expression in article 38(1)(d) of its Statute. This article allows the Court to use judicial decisions as subsidiary means for the determination of rules of law. Notwithstanding, it appears from a large portion of the literature on article 38(1) and, on the face of article 38(1) itself (particularly its paragraph (d)), that judicial decisions, though mentioned in the article are not a source of international law in accordance to which the Court is expected to perform its functions.

In stark contrast to this conventional approach to the issue of sources of international law, this thesis is clearly advancing the opposite claim: the judgments of the ICJ are indeed a source of international law. The thesis will substantiate this argument by a careful analysis of the case law of the ICJ in the following chapters of this work.

This chapter, however, shall aim to shed light on the more theoretical aspects which surround this novel claim of the thesis. Even if we ultimately accept that the judgments of the ICJ are a source of international law, the question remains as to why we should accept that the case law of the ICJ performs such a function. How are we to account for the conventional approach of the sources of international law, besides the purely grammatical interpretation of Article 38(1) (which will be elucidated in Chapter three), can the claim that this thesis is advancing be reconciled with our current understanding of international law theory?

The thesis will argue that the conventional approach to the sources of international law is, by and large, the product of an outdated conception of international law, which was influenced by notions of sovereignty and positivism that held sway during the early 20th century and have found their expression in Article 38(1). However, much more importantly, this largely historical account of international law coheres with neither our current understanding of international law nor the evolution of the role of the ICJ within international law.

In the following sections of this chapter, these issues will be elaborated in greater detail. Sections 1-3 will analyse the theoretical underpinning of the conventional account that the judgments of the ICJ are not a source of international law: these are sovereignty, positivism and the corresponding place of the judge in positivist accounts of the law. Similarly, section 4 will discuss the limitations imposed on the ICJ. The remaining sections 5-7 will shift the focus of the analysis to the ICJ itself. Section 5 highlights the fact that the ICJ straddles the divide between common law and civil law, as an international court of justice. Section 6 stresses that the ICJ also occupies a unique position in the international community of proliferated dispute resolution mechanisms. For these reasons, section 7 concludes that the ICJ should be an integral part of international lawmaking process. Section 8 briefly details the signposting of the following chapters.

1.1 Sovereignty

The traditional conception of sovereignty in international law presupposes that States, being sovereign, were independent of other States, and of the totality of the international community. As sovereigns, they were subject to no other being, but to their own will alone. This voluntarism is the direct consequence of State sovereignty reflected in the rule of consent which is inherent in the nature of international law. Such rules as international law reflect the will and consent of States; no State can be compelled to submit its dispute to

judicial settlement without its consent,⁴ are part of the bundle of rights contained in the notion of State sovereignty.

In his discussion of the limitations on the judicial settlement of international disputes, Lauterpacht placed the concept of sovereignty at the centre of the limitations. He asserted that sovereignty manifests itself in two major ways: (a) the right of a State to determine the future of international law by which it will be bound; and (b) the right to determine the content of existing international law in a given case. He located the theoretical foundation of the former in the positivist doctrine, which is more fundamental in international legislation;⁵ he thought the second included the rule that a State is not bound to submit to judicial settlement without its consent.⁶ A practical application of the latter rule is manifest in the general voluntary nature of the jurisdiction of international courts; and as it implicates the nature of the Court's jurisdiction, it is one that has followed the Court from its inception.

The real consequence of this conception of sovereignty lies in the rule that no State can be bound by a law without its consent.⁷ Beyond the State, therefore, there was no other entity with lawmaking capacity under the traditional international setting. This was reflected in the reasoning of the PCIJ in *S.S. Lotus*⁸ that the "rules of law binding upon States ... emanate from their free will ... and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims".⁹ This reasoning did not only affirm the consent-based nature of international law, it also clearly took cognisance of the traditional international law setting where States alone were the subjects of the law and the only actors on the international plane. The rule that States as equal

⁴ Under international law, "no State can, without its consent, be compelled to submit its disputes with other States to either mediation or arbitration, or to any other kind of pacific settlement" – *the Status of Eastern Carelia*, Series B No. 5, p. 27. Patrick Kelly, "The International Court of Justice: Crisis and Reformation", 12 *Yale J Int'l L*, 342, 343, (1987) (stating that "the acceptance of compulsory jurisdiction requires the surrender of an element of sovereignty")

⁵ Hersch Lauterpacht, *Function of Law in the International Community*, p. B2 (Connecticut: Archon Books 1966)

⁶ *Ibid*, p. 4

⁷ See Sovereignty and Federation in International Law in *International Law Collected Papers of Hersch Lauterpacht*, 7 (Vol. 3, E. Lauterpacht ed. Cambridge: Cambridge University Press, 1977)

⁸ Series A, No. 10 (1927), Judgment of September 7, 1927,

⁹ *Ibid*, p. 18

sovereigns were the only subjects of the law foreclosed the possibility of the recognition of another entity capable of creating international law.¹⁰

States exercise their sovereignty in the creation of international law by way of consent. The rule that no State is bound without its consent naturally makes consent the yardstick for measuring the validity of a rule as a rule of international law. It would follow that the rule of State consent is a major obstacle to the acceptance as a rule of law, a rule that did not directly emanate from States. This invariably questions the competence of the ICJ to make or develop international law within a legal space dominated by States when States are readily ascribed the function of the sole makers of the law. This poses a theoretical barrier to the acceptance of the decisions of the ICJ as a source of international law.

It is, however, no longer a safe ground of argument to continue to rely on the era of the prevalence of absolute sovereignty to judge the progress of international law in an era in which the statist approach to the creation of international law has been weakened. This weakness arose, not only from the fact that the concept of sovereignty has been liberalised to such an extent that the relations of States *inter se* are no longer solely regulated by the rules they have agreed upon in advance, but also by the roles international organisations now play as important actors in the international sphere. This new trend is also evident in the entities that are now able to carry international law rights and obligations. The contemporary reality of the liberalised international space to cover entities other than States is that the behaviours of States are now readily influenced and sometimes controlled by rules emanating from entities other than States – examples are international organisations and international Courts.¹¹

¹⁰ See Anthea Roberts & Sandesh Sivakumaran, “Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law” 37(1) the Yale Journal of Int’l L. 108, 112 (2012)

¹¹ Patrick Tangney, “The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany.” 21 Yale J. Int’l L. 395, 402, 404 – 406 (1996) (stating that States which joined the IMF agreed to cede some control over monetary policies and exchange rates by agreeing to be bound by the rules specified by IMF) There also are the International Labour Organisation (ILO), the International Civil Aviation

In making the foregoing point, the writer is aware that the fact that there is no express State consent to rules made by an international organisation or court is not conclusive of lack of consent. So long as international organisations and international courts are established through state consent, the organisations remain the creation of States in exercise of their sovereignty. By that initial consent, international organisations and courts exercise, not their own powers, but the powers of States that established them, even in the instances that they exercise incidental powers which are not expressly granted by States. As a corollary, the rules and regulations made by an international organisation bind the States that have consented to membership of that organisation. Accordingly, consent may well be blurred to the extent to which organs of a particular organisation are allowed to make rules, take decisions and enforce them against States, but at the root, and indeed the real source of the legitimacy of such organisations and the rules they make is the consent of State parties to the establishment of the organisation.¹²

To understand the intricate operation of consent in modern international law, the highlight of the modern view of consent should be on the fact that international organisations and courts now readily exercise implied or incidental powers that appear, sometimes, to overshadow the powers expressly granted; and that to this exercise of implied powers, States generally acquiesce. Any theory of international law that concludes from an obscurity of state consent in the exercise of powers by international organisation or courts to argue that the rule of state consent no longer controls can only be self-destructive.

It is, therefore, important to bear in mind that though the relevance of sovereignty and state consent to the creation of international law has been tampered by signs and events of modernity, sovereignty still remains the bedrock of international law, and the rule of state

Organisation (ICAO), the various regional organisations now existing, among others.

¹² Oren Perez, "Purity Lost: The Paradoxical Face of the New Transnational Legal Body", 33(1) *Brook. J. Int'l L* 1, 6 (2007) (reminding us that such acts as ratification, acceptance, approval and accession are all manifestations of consent).

consent the fountain from which international law springs to life.¹³ In the realm of international lawmaking, therefore, state consent as encapsulated in the notion of sovereignty, still controls. The writer has been quite conscious of this in his argument that decisions of the ICJ are a source of law. Hence, as shall be seen in chapter two, the writer sought to base his argument on the implied consent of States. The writer argued that implied consent is deducible from the consent to the Statute of the Court and from the habitual practice by which States rely on the decisions of the Court as authoritative.

1.2 Positivism

The strict positivist doctrine which prevailed in the 19th – early 20th Centuries saw law only through the lens of the formal will of a sovereign. A rule is not a rule of law if it does not proceed from a sovereign being through a formal lawmaking procedure. The strict positivist understanding of law feeds on the concept of sovereign equality as a basis of distinguishing between legal and non legal rules. Their argument followed the traditional statist nature of international law, where absolute sovereignty reigned supreme, and where States were the only subject of international law. States being sovereign equals and the only subjects of the law, it must be States alone that are capable of creating the law that govern their conducts. This view excluded all rules that emanated from sources, other than treaties and customary law, from the purview of international law.¹⁴ According to John Henry Merryman, “...state

¹³Cesare P.R. Romano, “The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent”, 39 *International Law and Politics*, 791, 793 and 795 (2007) (agreeing that the principle of consent constitutes the basic constitutional doctrine of the law of nations)

¹⁴ Hersch Lauterpacht, “Westlake and Present Day International Law”, in *International Law Collected Papers of Hersch Lauterpacht* 385, 393 (Vol. 2, E. Lauterpacht ed. Cambridge: Cambridge University Press, 1975) (stating that under the rigid positivist formula only customs and treaties are sources of international law); Lauterpacht, *Function of Law*”, note 5, 57, (stating that “the rigid positivist believes that nothing short of a rule of conduct expressly accepted by States possesses the authority of a rule of international law”).

positivism, as expressed in the dogma of the absolute external and internal sovereignty of the state, led to a state monopoly on lawmaking”.¹⁵

In view of what has been said above about sovereignty, the tenability of the strict positivist understanding of international law in contemporary international law remains to be seen. Indeed the concept of sovereignty, as now understood, does not make it impossible for States to accept rules of law emanating from international institutions in furtherance of the specific activities for which States have themselves created the institution. As aptly argued by Lauterpacht:

As there is nothing in the current doctrine of sovereignty which should lead us to adopt the rule that states only are the subjects of international law, so there is nothing in it which should compel us to adopt the purely positivist view in the controversy touching the sources of international law.¹⁶

It is, therefore, safe to assert that the collapse of the traditional stricture of sovereignty now questions the tenacity of the strict positivist view on the sources of international law. This in turn would question any argument that seeks to disapprove judicial legislation on the basis of positivism.

1.3 The Office of the Judge is to Interpret and not to Make Law

Article 38(1) expressly requires the ICJ to “decide” disputes. This formulation is in line with the office of the judge in other systems of law: judges are to decide and not to make law.¹⁷

The desire to keep the lawmaking and law-application functions separate creates abhorrence towards judicial legislation. This, perhaps, explains the caution which every system exercises

¹⁵ John Henry Merryman, *The Civil Law Tradition*, 22 (2d ed. 1994) cited in Ryan McGonigle, “The Role of Precedents in Mixed Jurisdictions: A Comparative Analysis of Louisiana and the Philippines”, 6(2) EJCL, July 2003, (available at <http://www.ejcl.org/62/art62-1.html>)

¹⁶ Hersch Lauterpacht, “Westlake and Present Day International Law”, note 14, p. 393; Quincy Wright, “Legal Positivist and the Nuremberg Judgment”, 42 Am. J. Int’l L 405, 407 (1948) (arguing that due to lack of a workable legislature, it is not practicable under international law to leave the adaptation of the law to the legislation and require the courts to be positivists.)

¹⁷ Martin Shapiro, “Judges as Liars” 17 Harv. J. L. & Pub. Pol’y 155, 155 (1994) (arguing that “courts, by their very nature, are institutions designed to resolve conflicts between parties”)

towards the recognition of judicial decisions as a formal source of law. It is believed that judicial legislation is a dangerous usurpation of legislative powers, and one that provides incentives for the tyranny of the judiciary. Accordingly, judicial legislation is seen as “...derogatory to the sovereignty of the people to subject the citizen, not to the law of the State, but to the magistrate’s personal judgment as to what is right”.¹⁸ Judicial lawmaking also had to labour under the influence of Baron de Montesquieu. Under his teachings the judicial role was underpinned by two important ideas. The first idea was that the judge was nothing more than the mouth of the law; she is forbidden from adding anything to the law. The judge was only to expound what was already inside the statute.¹⁹ The second idea was that the judge’s function was to be that of a legislative referee; this was to the effect that only the legislature can resolve legal questions and when the judiciary decides a case it does so through the will of the legislature.²⁰ These, perhaps, account for the observation that the criticisms against judicial innovation is delivered with “a pejorative overtone which implies that judges who ‘create’ rather than find the law somehow usurp the legislator’s function and profane their own”.²¹

Judges, national or international, understand this sentiment. Hence they tread cautiously and would not admit the role they play in lawmaking, albeit, obvious. According to Robert Jennings, the most important requirement of the judicial function is to be seen to be applying existing, recognized rules, or principles of law even when he creates a new law.²² This may explain why judges often make such statements as “Undoubtedly a court of law declares what

¹⁸Hersch Lauterpacht, “The So-Called Anglo-American and Continental Schools of Thought in International Law”, 12 Brit Y.B Int’l. L, 31, 56 (1931)

¹⁹ Mario Ascheri, “A Turning Point in the Civil-Law Tradition: From Ius Commune to Code Napoleon”, 70 Tul. L. Rev. 1041, 1042 (1995-1996)

²⁰ *Ibid*

²¹ Jack G Day, “Why Judges Must Make Law” 26(3) Case Western Reserve Law Review, 258, 258 (1975-1976)

²² Robert Jennings, “The Judicial Function and the Rule of Law in International Relations”, in International Law at the Time of Codification, Essays in Honour of Roberto Ago, 4 vols. (Milan, 1987), III, pp 141-142, cited in Mohamed Shahabuddeen, Precedent in the World Court, 232 (Cambridge: Cambridge University Press, 1996)

is the law, but does not legislate”.²³ No wonder, John Austin spoke of “the childish fiction employed by ... judges that ...common law is not made by them”.²⁴ And he supposed that the common law “is a miraculous something made by nobody, existing ... from eternity and merely declared from time to time by judges”.²⁵ In his brief but blunt article, Martin Shapiro argued that judges generally make law and lie about it.²⁶ Frederick Schauer appears unconvinced by the negative theoretical arguments and denials as he argued that it is far too late in the day to deny that judges are often engaged in the process of lawmaking both in the context of pure common law decision-making or in the context of the supposed interpretation of capacious language in statutes.²⁷

While it is convenient to deny judicial lawmaking, the intricate relationship between judicial lawmaking and law-application and the fine line that divides the two make it impossible to completely separate them.²⁸ According to Brierly, the complete separation of the legislative and the judicial functions is something that exists in the imagination of constitution makers,

²³ *Judge Tanaka, dissenting, South West Africa Cases (Second Phase)*, ICJ Rep, 1966, 6, 277. (The Judge was quick to point out that there is a very delicate border-line between judicial legislation and judicial declaration).

²⁴ John Austin, *2 Lectures on Jurisprudence* 634 (Murray, 5th Edn. 1885, Robert Campbell, ed) cited in Frederick Schauer “Do Cases Make Bad Law?” 73 *University of Chicago Law Rev.* 883, 885 (2006)

²⁵ John Austin, *ibid.* Brierly agreed with Austin’s observation, but he disagreed with, “the lesson that he drew from it ...that judges should not only drop the fiction but abandon the legislative side of their function altogether” – Hersch Lauterpacht and C.H.M Waldock, *The Basis of Obligation in International law and Other Papers of late James Leslie Brierly* 98 (Oxford, 1958).

²⁶ Martin Shapiro, note 17, p.155

²⁷ Frederick Schauer, note 24, p., 888. Also see DPO Connell, *International Law*, 12 1965 cited in Cherif Bassiouni, “A Functional Approach to “General Principles of International Law”, 11 *Mich. J. Int’l L.* 768, 777 (1980-1990) (arguing that, “if international law is ... an organic growth reflecting more the life of the international community ... then the creative role of the judiciary is important, and its pronouncement upon emanations from basic principles significant”.)

²⁸ Armin von Bogdandy & Ingo Venzke “Beyond Dispute: International Judicial Institutions as Lawmakers”, 12 *German L.J.*, 979, 985 (2011) (arguing that “the discretionary and creative elements in the application of the law make the law”. The authors further argued (in p. 994) that the “quintessential lessons of modern constitutionalism, which is worth recalling, is that legislation and judicial adjudication are two phenomena that should be kept apart and at the same time be understood in their intricate interaction”.); Robert B. Brandom “Some Pragmatic Themes in Hegel’s Idealism: Negotiation and Administration in Hegel’s Account of the Structure and Content of Conceptual Norms”, 7 (2) *European Journal of Philosophy*, 164, 180 (1999) (arguing that “there is nothing more to the content of the legal concepts being applied than the content they acquire through a tradition of such decisions, that the principles that emerge from this process are appropriately thought of as ‘judge-made law’”); Marc Jacob “Precedents: Lawmaking through International Adjudication” 12 *German L.J.* 1005, 1054 (2011) (arguing that though it “is accepted that a system of law expressly sanctioning judicial legislation would be a contradiction in terms, judicial law-making in this sense is a permanent feature of the administration of justice in every society”); Manley O. Hudson, “The Prospect for International Law in the Twentieth Century”, 10(4) *Cornell L.Q.*, 419, 437 (1925) (noting that the PCIJ offered a promise that the judge-made part of international law will not be neglected in future)

but not in the nature of things.²⁹ The present writer cannot but agree with the admonition of von Bogdandy and Venzke, that insisting, in doctrinal terms, that judges should only apply and not make law does not make the phenomenon go away, as judicial lawmaking is an integral element of almost every adjudicatory practice.³⁰ According to the authors:

It seems that, as a matter of fact, many decisions not only aim at settling the case at hand, but also at influencing the general legal discourse by establishing abstract and categorical statements as authoritative reference points for later legal practice. This aspect of the phenomenon ... also clearly transcends the limits of the particular dispute and impacts the general development of the legal order....³¹

The fact that the observations made above are of a general character and more conducive to municipal law where courts have clear constitutional mandate within a system in which judgments of courts are habitually obeyed, may merit some level of circumspection when the discussion relates to an international court. On the other hand, it is not enough to conclude from the fact of the differences between municipal courts and international courts that lawmaking is not incidental to law-application by international courts. What must be appreciated is that decisions of courts are always reference points for the courts; for potential litigants and for researchers who want to understand the working of a particular law. As judgments are preserved and made readily accessible through law reporting, it becomes impossible for the legal rules adopted by the court in the course of deciding a particular case to pass unnoticed. The bottom-line, therefore, is not whether such judgments are habitually obeyed, it is whether the judgments are binding and valid; it is whether the litigants, themselves, understand that the law to be applied to them is not perfect and that in resolving the controversy between them, the court will have to choose a reason, which will invariably

²⁹ Hersch Lauterpacht and C.H.M Waldock, note 25, p. 98 (further stating that in any system of law, the function of the judge is not merely to apply a rule, but also to formulate a rule which he may apply). Mack E. Barham, "A Renaissance of the Civilian Tradition in Louisiana", 33 Louisiana Law Review. 357, 364 (1972-1973) (arguing that if the judiciary was to function in a purely mechanistic role, there would have been no need for a judiciary, as sovereignty could have functioned only with a legislator to make the law and an enforcer to put the law into effect).

³⁰ von Bogdandy and Venzke, note 28, p 982-983.

³¹ *Ibid*, p. 988

deny the interpretation placed on the applicable law by either or both of the litigating States. As shown in chapter seven, the lawmaking activities of the ICJ lie in the supply of the minute details in the written law which the facts of the controversy between the parties bring to light. This sufficiently explains why, irrespective of the nature of the jurisdiction of the ICJ, “[State] actors tend to develop their normative expectations in accordance with past judgments. They will at least expect a court [the ICJ] to rule consistently if a similar case arises”.³²

It is, therefore, conducive to observe that any approach to the role of the international judge that insists on the strict positivist view that judicial decisions do not make law is clearly no longer sufficient to explain the role of judges in international law.

It is useful to remark at this point (as later argued in this work) that articles 36 and 38 place a premium on the ability of the Court to decide every case for which it has been properly seised. As the Court is the authoritative interpreter of international law, the decision of which is regarded as stating the correct position of the law, any potential litigant before the Court, holding the position that the Court only declares and not state the law, does so at its peril. According to Cesare Romano, “when a dispute settlement organ has been empowered to interpret authoritatively a legal regime and when its judgments become an integral part of that regime ... then its judgments necessarily have an effect *erga omnes partes contractantes*”.³³

1. 4 Limitations to the Functions of the ICJ

Before proceeding to further explain why these theoretical foundations of the conventional approach are no longer sufficient to accurately describe the position and role of the ICJ in contemporary international law, a further important point must be made: judicial lawmaking can arise only within the context of deciding concrete disputes, and that the Court can only

³² *Ibid*, p 987. The practical manifestation of this expectation is discussed in some details in chapter four.

³³ Cesare Romano, “The Proliferation of International Judicial Bodies: Pieces of the Puzzle”, 31 N.Y.U.J.Int’l L. & Pol. 709, 737, (1998-1999)

decide disputes within the area of its competence. It follows that the Court cannot make or develop the law in areas to which its competence does not extend. The importance of the patronage the Court receives becomes more germane to its lawmaking functions when viewed against the fact that the doctrine of *stare decisis* is inoperative in the Court. The implication will be that when fewer cases are decided by the Court, the development of international law by the Court and the ability for self-correction and the possible refinement of the rough edges of a rule/principle adopted in a particular case will be lacking. This will further hinder the opportunity for the Court to define the scope of operation of such rules/principles. Nothing more can cause this hindrance than the absence of an analogical factual situation to the case in which the rule/principle was first stated. Accordingly, a discussion of the role of the ICJ cannot omit references to the limitations placed upon its jurisdiction, knowing that such limitations on its judicial functions may significantly impact on its case-law, particularly in view of the absence of *stare decisis*. The writer shall now briefly discuss the limitations.

1.4.1 Absence of *Stare Decisis*/Article 59

The notion that article 59 of the Statute of the Court excludes the rule of *stare decisis* is the most damaging to the acceptance of decisions of the ICJ as a source of international law. The most famous assertion here is the one that equates article 59 with the exclusion of the rule of *stare decisis* from the practice of the Court. Based on this assertion, it is simply concluded that absent *stare decisis*, judicial decisions are not a source of international law. This was the argument clearly made by Emilia Justyna Powell and Sara McLaughlin Mitchell. They contended that most scholars agree that the doctrine of *stare decisis* would not be applied in

international law; and that by virtue of article 59 the ICJ is forbidden from formally introducing jurisprudential continuity by invoking its previous decisions.³⁴

As will be seen later in chapter four, the present view does not dispute the absence of *stare decisis* in the ICJ, but it disputes any argument that seeks to place that result on article 59. Besides, the writer is convinced from the discussion of the common law and civil law approaches below, that judicial lawmaking is not synonymous with *stare decisis*, as the absence of the rule has not made it impossible for some level of judicial lawmaking at civil law; neither has it made it impossible for the ICJ to engage in some forms of lawmaking in the course of its activities. That said, article 59 needs not delay us here, as it has been discussed in detail in chapters two and six. As shown in these chapters, other than referencing it in article 38(1)(d), article 59 has no real bearing on the authority of the decisions of the ICJ as a source of international law.

1.4.2 The Voluntary Nature of the Jurisdiction of the Court

A major obstacle that limits the use of the Court is the voluntary nature of its jurisdiction as prescribed in Articles 35 and 36 of its Statute. During the making of the Statute of the PCIJ, in order to resolve the disagreements between States in favour of compulsory jurisdiction and States³⁵ against it, a compromise³⁶ was found in the adoption of the optional clause system.³⁷

It was hoped that as States adhere to the optional clause system, in addition to compromissory

³⁴ Emilia Justyna Powell and Sara McLaughlin Mitchell, “The International Court of Justice and the World’s Three Legal Systems” 69 (2) *The Journal of Politics*, 397, 401 (2007).

³⁵ These were mainly the great powers. See B.C.J. Loder, “The Permanent Court of International Justice and Compulsory Jurisdiction”, 2 *Brit Y.B Int’l L* 6, 20 and 23 (1921-1922) (stating that the League Council was goaded to reject automatic compulsory jurisdiction by England’s opposition to automatic compulsory jurisdiction). Unfortunately, this situation did not change during the making of the Statute of the ICJ. See C.H.M Waldock, “Decline of the Optional Clause” 32 *Brit Y.B Int’l L* 244, 245 (1955-1956), (explaining that neither the Soviet Union nor the United States was at the time of making the Statute of the ICJ prepared to accept automatic compulsory jurisdiction for legal disputes.)

³⁶ Thomas J. Pax, “Nicaragua v. United States in the International Court of Justice: Compulsory Jurisdiction or Just Compulsion?”, 8(2) *Boston College Int’l & Comparative Law Review*, 471, 475-476 (1985) (stating that “the basis for the jurisdiction of PCIJ resulted from a compromise between the desire for compulsory jurisdiction and the desire to see the Court gain the necessary support among nations to exist as an international entity”). The same view was expressed in Loder *ibid* p. 24; Ruth Lawson, “The Problem of the Compulsory Jurisdiction of the World Court”, 46, *Am. J. Int’l L*, 219, 219

³⁷ Report of the Third Committee, Annex 16, in Documents Concerning Actions Taken by the Council of the League of Nations Under Article 14 of the Covenant, p. 172 (online: <http://www.icj.org/homepage/index.php> last visited 10.08.12).

clauses³⁸ in treaties in force, the jurisdiction of the Court will gradually become compulsory. This has been a shattered hope,³⁹ not just because only 67 of the 193 members of the UN and parties to the Statute of the Court are currently parties to the optional clause system, but also because some States, which had adhered to the optional clause, are no longer part of the system. Of the five permanent and veto wielding members of the UN Security Council, the United Kingdom is the only member still adhering to the compulsory jurisdiction of the Court under the optional clause system. Russia and China have never adhered thereto, while the United States of America and France which once adhered are no longer part of the system.⁴⁰ This in addition to the limitations placed on the jurisdiction of the court by the various reservations contained in the optional clause declarations by which States accepted the compulsory jurisdiction of the Court.⁴¹ These come with the negative consequence of limiting the role of the Court by removing from the purview of the court's jurisdiction, important subjects of international law.

³⁸ Gary L. Scott and Craig L. Carr, "The ICJ and Compulsory Jurisdiction: The Case for Closing the Clause", 81 Am. J. Int'l L 57, 57.

³⁹ J. Patrick Kelly, "The Changing Process of International Law and the Role of the World Court", 11 Mich. J. Int'l L, 129, 139 (1989-1990) (arguing that "the inchoate hope is that the greater participation in the compulsory jurisdiction system will increase utilization of the court and thereby expand international legal doctrine and respect for international law".) Historically, the Optional Clause System was conceived as a sort of compulsory jurisdiction device that was hoped would result in the ascription of universal automatic jurisdiction. Unfortunately, the optional clause system has been in crisis from when it was adopted. See Richards Erle, "The Jurisdiction of the Permanent Court of International Justice", 2 Brit Y.B. Int'l L, 1, 4 (1921-1922) (Arguing that any agreement to refer dispute compulsorily to a tribunal with a fixed rota of judges was premature). Cf. Loder, note 35, p. 8, (holding the contrary view and expressing the hope that the future of the Optional Clause System would be compulsory jurisdiction.); Shigeru Oda, "The Compulsory Jurisdiction of the International Court of Justice: A Myth?" 49 Int'l & Comp. L.Q, 251 (2000) (highlighting the numerous problems associated with compulsory jurisdiction to include withdrawal by respondents, preliminary objections and non-compliance with judgments); Stephen Schwebel, "Reflections on the Role of the International Court of Justice", 61 Wash. L. Rev 1061, 1063 (1986), (asserting that the optional and consensual nature of the jurisdiction of the Court is its critical weakness); Eric Posner and John Yoo, "Judicial Independence in International Tribunals", 93, Cal. L. Rev. 1, 34-41 (2005) (Finding that the fewest number of enforced judgments are those instituted under the Optional Clause System). Aloysius Llamzon, appears to dispute these findings – Aloysius Llamzon, "Jurisdiction and Compliance in Recent Decisions of the International Court of Justice", 18(5) EJIL 815, 845, 846 (2007). It should be said, though, that problems the optional clause system faces in practice, albeit huge, they do not discount the value of the optional clause system as one of the most important device in the Statute.

⁴⁰ Ian Brownlie, *The Rule of Law in International Affairs* 113 (The Hague: Martinus Nijhoff Publishers 1998) (observing that France and the United States terminated their respective acceptances in 1974 and 1985, respectively). For the list of States currently adhering to the optional clause system see www.icj-cij.org/jurisdiction/index. (Accessed August 10, 2012)

⁴¹ Despite both parties being parties to the optional clause system the Court may yet not have jurisdiction in as a result of reservations in their optional clause declarations. See *Certain Norwegian Loans*, ICJ Rep 1957, 9. It has for this reason been argued that the compulsory jurisdiction of the Court is not truly compulsory – Stanimir A. Alexandrov, "The Compulsory Jurisdiction of the International Court of Justice: How Compulsory is It?" 5(1) Chinese Journal of Int'l Law, 29 (2006)

For instance, the non adherence by Soviet Union and Hungary to the compulsory jurisdiction of the ICJ in any form made it impossible for the United States to unilaterally summon them before the Court respecting a novel and interesting question raised in the application filed by the United States. The Court would have had the opportunity of enriching the corpus of international law (perhaps, by analogy from the law of trespass) on the effect of mistake on the violation by a State of the territory of another State in time of peace.⁴²

On the other hand, the shortcomings of compulsory jurisdiction under the optional clause system are sometimes compensated for by compromissory or jurisdictional clauses in treaties in force.⁴³ The ICJ website lists a total of 296 of both bilateral and multilateral treaties which confer jurisdiction on the ICJ.⁴⁴ Unfortunately, this has also witnessed a steady decline since the 1960s. In short, between 2003 till date the website does not have a record of the notification of any such treaty to the registry of the Court.

It may be argued, though, that the fact that some matters are outside the purview of the contentious jurisdiction of the Court is not decisive of the exclusion of the role of the Court in developing international law in that area. This is because it is possible to dress up a real litigation between States in the garb of a request for an advisory opinion. Indeed, as once stated by the UN Secretary General concerning situations where States may fail to refer certain matters of general concern to the Court, “the process of achieving a fair and objectively commendable settlement and thus defusing an international crisis situation would be facilitated by obtaining the Court's advisory opinion”.⁴⁵ To this, the President of the ICJ added that to have the ICJ more often employed with respect to the legal components of

⁴² See *Aerial Incident of September 4th 1954 (United States of America v Union of Soviet Socialist Republics)*, ICJ Rep 1958, 158; *Treatment in Hungary of the Aircraft of the United States of America*, ICJ Rep 1954, 99

⁴³ Jonathan I. Charney, “Compromissory Clauses and the Jurisdiction of the International Court of Justice”, 81 Am. J. Int’l L. 855, 855 (1987) (observing that jurisdictional clauses appears to be a more important source of the Court’s jurisdiction)

⁴⁴ www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=4 (accessed November 10, 2012)

⁴⁵ Robert Y. Jennings, “The Role of the International Court of Justice” 68(1) Brit Y. B of Int’l L., 1, 3 (1997)

situations with which the United Nations is concerned would, quite apart from its possible contribution to solving a dispute or situation, also do immense good for international law.⁴⁶

This is important because, as argued later in chapters six and seven, lawmaking by the Court is not limited to contentious cases, but also occurs in its advisory jurisdiction. In consequence, where disputant States are unwilling to refer certain disputes of general concern to the Court, the Court should yet be able to define the law concerning the matter, when its advisory jurisdiction is invoked in respect thereof.

The gradual depletion of the list of States adhering to the optional clause and the decline in the number of treaties referring disputes to the Court are such that must affect the role of the Court in lawmaking; as the jurisdiction of the Court narrows down,⁴⁷ so are areas over which its decisions will cover.⁴⁸ In addition, there will not be sufficient occasions for the complete development of rules/principles arising from the decisions of the court.

1.4.3 Matters of Domestic Jurisdiction

The voluntary nature of the jurisdiction of the Court is further manifested in the power of States to circumscribe the matters conducive to judicial settlement. This places restrictions on the role of the Court. States usually do this by way of reservations which are commonplace in the Declarations by which States accept the compulsory jurisdiction of the Court. This is done to satisfy the perception among States that certain disputes are not fitting for judicial settlement; such matters are either left to the internal jurisdiction of each State or they are simply non-legal, and thus not justiciable. This notion of matters falling within the domestic jurisdiction of States or their reserved domain was recognised in article 15(8) of the League

⁴⁶ *Ibid*

⁴⁷ Schwebel, "Reflections" note 39, p. 1064 (observing that the disputes submitted to the Court by States are too few in a world full of international legal disputes between States. He also saw a decline in requests for advisory opinions in comparison with the PCIJ)

⁴⁸ Thomas Buergenthal "Lawmaking by the ICJ and Other International Courts", 103 *Am Soc'y Int'l L. Proc.* 403, 404 (2009), (Arguing that "as the number of cases grows, so does the international law the Court is called upon to interpret and apply. In the process, it clarifies existing law and of necessity makes new law, not with the broad brush strokes generally employed by legislatures, but by what might be called normative accretion".)

of Nations Charter and replicated in article 2(7) of the United Nations Charter. By these articles, no State can be compelled to submit matters which are “by international law” or “essentially” within her domestic jurisdiction to settlement by international mechanisms. The exclusion of such matters from international judicial settlement was affirmed by the PCIJ in the case between *Great Britain and France as to the Tunis and Morocco Nationality Decrees*.⁴⁹ In the case, the PCIJ opined that as regards matters within the reserved domain, each State is solely the judge.⁵⁰

The problems this notion causes to international law, and by extension the jurisdiction of its courts, were of great concern to J.L Brierly.⁵¹ Brierly thought the establishment of the rule of law between nations may be hindered by the definition of matters of domestic jurisdiction. This, he believed, would have the effect of relegating international law to the position of a convenient means of settling disputes of minor importance or of facilitating the routine of international business.⁵² He lamented that “every state still shrinks from committing its most important interests to the arbitration of international law”.⁵³

This limitation also caught the attention of Lauterpacht in his reflection on the limitation of the judicial function. Lauterpacht also lamented the perchance of States to draw a distinction between legal and non-legal disputes to the effect that, while the former is fitting for settlement according to law, the latter is not. He argued that following this distinction, certain matters of vital interest to the international community, as a whole, must be excluded from the purview of judicial settlement.⁵⁴ He opined that:

⁴⁹ Advisory Opinion No. 4 Series A. PCIJ 1923 (here, nationality was held to be within the reserved domain of States)

⁵⁰ *Ibid*, p. 23-24

⁵¹ J.L Brierly, “The Shortcomings of International Law” 5 Brit. Y.B Int’l L. 4, (1924); also see J.L. Brierly, “Matters of Domestic Jurisdiction”, 6 Brit. Y.B. Int’l L. 8, 9-10 (1925); C.H.M. Waldock, “The Plea of Domestic Jurisdiction before International Legal Tribunals” 32 Brit. Y.B. Int’l L. 96, 111 (1954)

⁵² Brierly, “The Shortcomings” *ibid*, p. 7

⁵³ *Ibid*

⁵⁴ Lauterpacht, “*Function of Law*”, note 5, p. 38. He trenchantly argued that the doctrine of non-justiciable dispute was the doctrine of the inherent limitation of the international judicial process.

By giving currency to the doctrine of non-justiciable disputes, states not only give expression to their desire not to accept without limitations the jurisdiction of international tribunals in disputes which may arise between them. They adopt at the same time a theoretical classification of disputes; they set up a legal construction.⁵⁵

As per the effect of the doctrine, he argued that it gives expression to the idea that international disputes are by the very nature of their content divided into two categories that exist so clearly as the basis of international obligations.⁵⁶ In particular reference to article 36 of the Statute of the ICJ, he argued that the classification makes it possible for a party to refuse to submit a case to the Court on the ground that, although, the dispute is covered by one of the four grounds in article 36, the dispute is, nevertheless, a political and not a legal dispute.⁵⁷

The concern of Lauterpacht was mainly that States use this distinction to relegate the functions of international courts to issues of minor importance to the exclusion of issues of major importance in international law. Also, that it gives States the latitude to specify the matters that they are willing to submit to judicial settlement.

Jennings appears to disagree with Brierly and Lauterpacht on this point. In Jennings' view the adjudication process is a thing on its own; it is in many respects different in kind from the other ways of dispute settlement, such as, for example, the other modes listed in Article 33 of the UN Charter. He opined that judicial settlement can only be applied to certain kinds of disputes. He noted that the effect of the limitation in article 38(1) of the Statute of the Court – “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it” – is that the dispute to be submitted to the Court must be a legal dispute in the sense that it must be a dispute about law.⁵⁸ He further argued that the simplistic ideas about the judicial function in international relations are very harmful to the public perception

⁵⁵ *Ibid*, p. 45

⁵⁶ *Ibid*, p. 43

⁵⁷ *Ibid*

⁵⁸ Jennings, “The Role of the International Court”, note 45, p. 50

of the role of the International Court of Justice and that the general public expects too much of the Court, and is then disappointed that there is so much violence in the world which the Court does not seem to be effective to control.⁵⁹

While not following the view that the distinction between justiciable and non-justiciable dispute is harmful to the role of the ICJ, he thought that what is important is the habit of States living under the law and not of hoping that all disputes must receive the sanction of the Court. For:

it is the habit of living daily under the law, and with habitual and normal recourse to the agencies of the law, that will make violence and aggression in defiance of the law more difficult. What we need is not just a crisis law but a law for normal existence...The lay-person cannot but gather from the notion of the 'peaceful settlement' of disputes, that international law is concerned essentially, if not solely, with an attempt, possibly a vain attempt, to control catastrophic State behaviour, and the threat to peace. It is so concerned, of course. But it cannot perform that task unless it is an on-going system in ordinary, normal, everyday international relations. And indeed, so it is. Let us not obscure that fact by the use of modes of expression which the law, happily, has long outgrown.⁶⁰

Indeed the point made by either side cannot be ignored. In line with the view of Jennings, it should not be expected that all matters that arise between States are matters befitting of judicial examination in the open court. If that was so, for what purpose was the Security Council and the General Assembly created? Is it not to play the role of political arbiters in the maintenance of peaceful coexistence? As in even the most advanced system of municipal law, certain matters there must be, that are not for judicial scrutiny – political question doctrine – not just for the sake of the nature of the matter but for the protection of the sanctity and integrity of courts.

On the other hand, a system that allows every of its member to determine the state of the law and when its actions can be called in question before a court can hardly meet the qualities of a

⁵⁹ *Ibid*, p 55

⁶⁰ *Ibid*, p. 54

society governed by law. The necessary balance must be struck and that balance is still missing in contemporary international law, particularly in matters relating to the jurisdiction of the ICJ.

1.5 The ICJ: An International Court of Justice Straddling between the Common Law and Civil Law Divide

The ICJ is by conception and birth of a mixed common law and civil law heritage; it is established upon two doctrinally different legal systems – civil law and common law. Given the exerting influence the legal traditions lawyers trained have on their perception of legal arguments, ideological divisions along the ideals of the common law and civil law can hardly be avoided in an area of international law dealing with concepts over which both systems appear to disagree. It cannot be avoided in our subject of study inasmuch as it deals with the authority of judicial decisions: an area in which both systems share some differences – differences which have been very well highlighted in the debate surrounding our theme of study. John Gardner gave insight to this fact when he noted that “one of the disturbing, and perhaps also retarding, elements in the development of public international law is the conflict between the English and Continental methods of legal thought.”⁶¹

The relevant argument here is that which argues that by providing in its article 59 that decisions have no “binding force except between the parties and in respect of that particular case”, the Statute of the Court reflects the civil law tradition that “judicial decisions are not a source of law”.⁶² It is from this argument that the view that “...supranational decisions will have binding force as judgments, not as precedents”,⁶³ takes its root.

⁶¹John C. Gardner, “Judicial Precedent in the Making of International Law”, 17 J Comp. Legis. & Int’l L. 3d ser., 251, 255 (1935)

⁶² Ernest A. Young, “Supranational Rulings as Judgments and Precedents”, 18 DJCIL 476, 508, (2008).

⁶³ Ernest Young, *ibid*, p., 508

The argument that article 59 is modelled along the civil law system as a means of rejecting the common law rule of *stare decisis* has a strong influence when considered in the light of the judicial abuse of power that culminated in the French revolution and the eventual proscription of judge-made law in France. As shown in the next chapter, the fear of trusting judges with lawmaking powers did operate in the minds of those who crafted the Statute of the PCIJ; hence is it generally believed that article 59 is a necessary safeguard against the fears expressed over the realisation that the judgements of the court will ultimately establish rules of international law. This, perhaps, explains why some of the interpretations that are placed on article 59, as did the PCIJ in the *Certain German Interest Polish Upper Silesia*,⁶⁴ reflect the language of Article 5 of the Code Napoléon, 1804. In proscribing the use of precedents by judges in France as a result of judicial abuse of power, the Code forbade judges when deciding cases brought before them, from “lay[ing] down general rules of conduct or decide a case by holding it was governed by a previous decision”.⁶⁵ The influence of this traditional disapproval of judicial legislation on the theoretical foundation of judicial legislation by the ICJ cannot be discounted.

It is gratifying to note, however, that the ICJ is not the only court that suffers this conflict of identity arising from a dual legal heritage. There are municipal legal systems (Louisiana, for example) which also suffer from this mixed legal heritage. In the case of Louisiana, the counter academic arguments⁶⁶ on the influence of *stare decisis* or otherwise on the civil law character of the Louisiana legal system highlights how difficult it is for a court open to the influence of both common law and civil law to totally renounce judicial lawmaking, even where the system is formally modelled after civil law. The lesson from Louisiana is that the

⁶⁴ PCIJ Series A, No. 7, 19

⁶⁵ Code Civil, cited in Ryan McGonigle, note 15

⁶⁶ Gordon Ireland, “Louisiana Legal System Reappraised”, 11 Tul. L. Rev. 585, 592 (1936-1937) (arguing that the civil law method in which the judge yields to the text has completely given way to the common law method); Harriet Spiller Daggett, Joseph Dainow, Paul M. Hebert, & Henry George McMahon, “A Reappraisal Appraised: A Brief for the Civil Law of Louisiana”, 12 Tul. L. Rev. 12 (1937-1938) (stating the opposite view). Also see John H. Tucker, Jr., “The Code and the Common Law in Louisiana”, 29 Tul. L. Rev. 739 (1955)

practice of judicial lawmaking in such a system does not cease by a mere theoretical denial that it does exist. According to Mack Barham, a former Justice of the Supreme Court of Louisiana:

Under our Code and through the historical civilian tradition, jurisprudence is not a major source of law, yet it has been and it remains such in reality. Possibly the belief in jurisprudence as a primary source of law is so strongly embedded in the minds of many of the judiciary and the practicing bar of Louisiana because our civil law system coexists in a nation with states which because of their common law heritage so regard jurisprudence. Even if our bar really believes that legislation is the primary source of law, it practices under the principle that jurisprudence is a major source of law. Lawyers often only perfunctorily examine legislative expression before they turn for final authority to the jurisprudence to resolve the legal question posed by their clients' cases.... As a result of the pressure under which we perform our various roles in our legal system, there has been a tendency to stray from strict civilian methods and concepts.⁶⁷

Having made this point, the writer shall now briefly discuss the approach of the civil law and the common law to judicial lawmaking.

1.5.1 The Common Law Approach

The common law concept of judge-made law – the doctrine of judicial precedent – is encapsulated in the principle of *stare rationibus decidendi*, usually referred to as *stare decisis* [let the decision stand]. Common law judges decide cases on the basis of previous decisions, where the material facts are similar enough to fall within the *ratio decidendi* of previous cases, except the circumstances of the present case warrant the court to distinguish the earlier decision and exclude its applicability. Through this device, the common law judge set down rules that will aid future judges in the resolution of otherwise difficult cases for which no legislation had been made in advance; or create new principles of law in construing legislations.

Apart from being a compass for future courts, through adherence to precedent, common law courts maintain consistency and the unity of the legal system, as judges of lower courts are

⁶⁷ Mack Barham, note 29 p. 359

bound to follow a precedent set by the apex court. The apex court is also bound by its precedent, but with the important proviso that the apex court has the power to overrule its own precedent. As noted by Ernest Young:⁶⁸

precedent includes both the “vertical” force of decisions issued by a court with power of appellate review over a second court, and the “horizontal” force of decisions issued by the same court (which that court can overrule) or by courts outside the line of appellate hierarchy.

Conscious of her role in rule formulation and the promotion of the rule of law, the common law judge, deciding a first impression case for which there existed no precedent or statutory authority, considers not only the narrow conflict before her, but also consciously decides the case within the larger context of possible eventualities that may fall within the principle the judge is set to establish in the case, should the principle fail to be applied to future litigants.

As a corollary, the judge deciding a similar case in the future is careful not to upset the law by failing to follow precedent without good cause. Although the duty to follow precedent is not mandatory on the highest court within the common law system as it is on lower courts (given that the highest court is at liberty to revise decisions and indeed precedents of lower courts, it is also at liberty to overrule its earlier precedents), there is still the reluctance to depart from its precedent except it is in the interest of justice to do so. As a result, precedents create a legitimate expectation in the minds of future litigants that the court would take a similar view in analogous situations.

1.5.2 The Civil Law Approach

The civil law system thrives on written codes. The civilian Codes are general statements of the law, statements of broad policy, statements of direction, statements of law which are meant to have a long continuity of existence.⁶⁹ The Code is seen as a complete and self-sufficient text, as a body of law in which it was always possible to find the rule for a new case. The system of codification follows the belief that one could find the law without

⁶⁸ Ernest A. Young, note 62, p. 502

⁶⁹ Mack Barham, note 29, p 369

referring to the previous law or to other sources, like natural law or jurisprudence or judicial decisions.⁷⁰ The fundamental tenet of all civil law systems is that legislative expression is the primary source of law, and common to all civil law systems is the comprehensive written and integrated basic text of that legislative expression.⁷¹ As Robert Henry observes, civil law judges function under the rule that they should not formulate rules of law in their own words, as that has been authoritatively done by the codes. Also that judges should not be influenced in their decisions by what other judges had held upon similar facts. The result is that the application of law does not give rise itself to new rules of law.⁷²

In consequence, in a pure civilian theory, judicial precedents are not considered to be a source of law because the “legislative function is entrusted to the legislature and the people exclusively”.⁷³ The existence of a Code is therefore central at civil law.

The foregoing, notwithstanding, judge made law still features at civil law. It is only that civil law begins with the rule that precedent is not binding and the makes exception when the matter is *jurisprudence constante*.⁷⁴ The system recognises that a long line of decisions on a certain subject may establish rules of law – *Jurisprudence constante*.⁷⁵ This doctrine holds that judicial precedent must be predicated upon a series of adjudications all to the same effect, rather than upon a single case.⁷⁶ *Jurisprudence constante* is, according to Dainow, considered binding in future cases.⁷⁷

⁷⁰ Mario Ascheri, note 19, p. 1045; Thomas Lundmark, Book Review, 46 AM J of Comp Law 211, 214-15 (1998), (noting that “one of the classic differences between civil-law and common-law jurisdictions is that the former ... do not recognize judicial precedent as an independent source of law”)

⁷¹ Mack Barham, note 29, p 363

⁷² see generally, Robert L. Henry, “Jurisprudence Constante and Stare Decisis Contrasted”, 15, A.B.A.J 11, 12 (1929)

⁷³ A.N. Yiannopoulos, Civil Law System: Louisiana and Comparative Law, A Coursebook Texts, Cases and Materials, 146 (2d. 1999)

⁷⁴ Henry, note 72, p 11

⁷⁵ See Yiannopoulos, note 73, p., 147

⁷⁶ Dagett, et al, note 66, p 18

⁷⁷ Joseph Dainow, “The Civil Law and the Common Law: Some Points of Comparison”, 15 AM. J. Comp. L 419, 427 (1966-1967); Martin Shapiro, “Toward a Theory of Stare Decisis”, 1 J. Legal Studies, 125, 125 (1972) (stating that *stare decisis* is the practice of Anglo-American courts of deciding new cases in accordance with precedents)

1.5.3 Some Differences between Both Systems

As seen above, judicial lawmaking features in both systems of law. The essential difference between both systems regarding judicial legislation is mainly methodological; what Tucker referred to as “the generating force of authority”.⁷⁸ As John Gardner observed, while a rule may be established by a single case at common law, jurisprudence only becomes fixed at civil law if the result of the cases shows that a rule, heretofore tentatively applied is a desirable one.⁷⁹ This view is supported by Daggett et al, who located the two most important differences between the two systems on: “(a) a single case affords a sufficient foundation for ... [*stare decisis*], while a series of adjudicated cases all in accord forms the predicate of the [*jurisprudence constante*]; and (b) case law in civilian jurisdictions is merely law de facto, while under the common law technique it is law de jure”.⁸⁰

Insofar as the acclaimed differences between the two systems lie in the concept of judicial lawmaking, any argument based on it ultimately leads to the conclusion that judges do actually legislate as judicial decisions begin to generate rules/principles of law in both systems. This is because both systems operate a line of judicial precedent that eventually concretise into lawmaking.⁸¹ The systems may approach judicial lawmaking differently but not to the extent that it can rightly be said that they are diametrically opposed to each other.⁸²

According to Loussouarn:

⁷⁸ John H. Tucker, note 66, p. 758.

⁷⁹ John Gardner, note 61, p., 255; D.P. O’Connell, *International Law*, 31 (2nd ed. Vol. 1 London Sweet and Maxwell 1970) (arguing that as a judge in the common law system plays a fundamental role in the formulation of general principles, in their application and modification by reference to contingent circumstances, so does the judge in the international system. He added that unlike at common law, it is not a single decision but their cumulative weight that is decisive at civil law)

⁸⁰ Daggett et al, note 66, p. 17

⁸¹ Katharina Pistor and Chenggang Xu, ‘Incomplete Law’, 35 NYU J Intl L & Polit 931, 946-47 (2003) (noting that although many believe civil law judges interpret the law and common law judges make law, “the line between lawmaking and interpretation is often difficult to draw”); Gilbert Guillaume, “The Use of Precedent by International Judges and Arbitrators”, *Journal of International Dispute Settlement* 2011, 5, 6 (arguing that in all national systems, precedent is the starting point of judges’ reflection); Mack Barham, note 29, p. 364 (agreeing that the depiction of civil law judges as mechanical by common law scholars is based largely on the folklore and the fiction.)

⁸² Dagette, et al, note 66, p. 16 (agreeing that judicial precedent plays an important role in both systems of law, although the doctrine of *jurisprudence constante* is entirely different from the common law rule of *stare decisis*)

The authority of judicial precedent in a codified system can be summed up in two propositions. The first is that in theory judicial precedent is not a source of law. The second proposition is that in practice the situation is very different and in fact precedent is a source of law.⁸³

It is apparent from a number of writings on the point that the so-called differences are more apparent than real. According to Maurice Amos:

the impression which prevails in England to the effect that in interpreting the code the French Courts do not recognise the doctrine of *stare decisis*, and are not influenced by the authority of precedent, is greatly exaggerated, if indeed it is not truer to say that it is simply mistaken. In the point of fact great respect is paid in France to the authority of decided cases; indeed it is sometimes said that things have come to such a pass nowadays, that counsel no longer need display any knowledge of legal principles, since all the judges will listen to is an exposition of the *jurisprudence*, as it is called.⁸⁴

This view was also echoed by Lauterpacht, who submitted that:

...this view as to the fundamentally different function of judicial precedent under the two systems of law is based more on a consideration of appearances and of legal formulae than of the substance of legal life. It disregards the fact that, on the one hand, no formal provision of the law and no form of judicial organisation can prevent judicial precedent from constituting a powerful factor of positive law, and that, on the other hand, the power of judicial precedent is in the long run not greater than the inherent value of the legal substance embodied in it. No legal doctrine and no express legal provision can do away with the fact that judges actually do, within their spheres, make law....⁸⁵

The bottom-line is that judicial decisions do eventually become law at civil law, notwithstanding the existence of a detailed code. In making this point, Lauterpacht noted:

In spite of the fact that French courts are not bound either by their own decisions or by decisions of superior courts, it is hardly possible to doubt the actual authority and influence of judicial precedent in France. The volume of law reporting in France, the scope of annotations and comment upon them, and the weight attached to *jurisprudence* in daily practice make it impossible to eliminate judicial precedent from any accurate account of forces actually operating in the shaping of French law.

The same applies to Germany, where a whole series of provisions of the civil code has been interpreted out of existence in consequence of the activity of

⁸³ Yvon Loussouarn, "The Relative Importance of Legislation, Custom, Doctrine and Precedent in French Law", 18 Louisiana L. Rev. 235, 255 (1958)

⁸⁴ Maurice Amos, "The Code Napoleon and the Modern World", Journal of Comparative Legislation, 3rd ser. X 225 (1928) cited in Lauterpacht, "The So-Called Anglo-American", note 18, p. 54-55.

⁸⁵ *Ibid.* Also see Hersch Lauterpacht, *Development of International Law by the International Court*, 127-129, (London Stevens & Sons Ltd, 1958)

courts. In the decisions of the Reichsgericht ... one finds elaborate references to previous judgments of the Court; not infrequently, this enumeration concludes with the word ... (this must be adhered to).⁸⁶

Whether viewed from the common law or from the civil law perspective, therefore, the inevitable conclusion is that judicial decisions become relevant at some point as a source of law. This affirms the observation earlier made that judicial lawmaking is, in one way or the other, a feature of every system of law, whether formally recognised or not.⁸⁷

1.5.4 Should *Stare Decisis* become the Method of the ICJ?

Before concluding this section, it is necessary to deal here with an argument that was earlier made by Goodhart. Goodhart had argued that the English method of precedent was more conducive to the fulfilment of the purpose of the Court. According to him:

As international law is still so vague and uncertain ... it is important that it should be given a more rigid and determinate character. No method could be more advantageous in accomplishing this purpose than the common law doctrine of precedent. But, on the other hand, this fixation of international law must be undertaken in a cautious manner for, as there is no legislative body which can amend the law, it is essential that a certain freedom of action shall be left to the judges.⁸⁸

Recently, this argument was more forcefully made by Vern Clemons, who argued that the Court's practice of following precedent should be clarified by its Statute to make *stare decisis* formally binding on the Court.⁸⁹ He further argued that this will bestow great credence upon the decisions of the Court and simply allow the Court to say that what is written is actually what is done.⁹⁰ On the other hand, John Gardner thinks otherwise. He did not see any prospect of the English method of precedent and the English doctrine of *stare decisis* becoming the method of the PCIJ.⁹¹

⁸⁶ Lauterpacht, "The So-Called Anglo-American", note 17, p., 53-54

⁸⁷ Katharina Pistor and Chenggang Xu, note 37, p. 947 (arguing that even in civil law countries, judges exercise residual lawmaking powers).

⁸⁸ A. L. Goodhart, 'Precedent in English and Continental Law', 50 LQR, 40, 64 (1934)

⁸⁹ H. Vern Clemons, "The Ethos of the International Court of Justice is Dependent Upon the Statutory Authority Attributed to its Rhetoric: A Metadiscourse", 20(4) Fordham International Law Journal 1479, 1507 (1996)

⁹⁰ *Ibid*, pp. 1509-1510

⁹¹ John Gardner, note 61, p., 255

Whatever advantages there are in the argument that *stare decisis* should be formally recognised, there are disadvantages that will result to the Court in corresponding, if not in greater degrees. The argument appears to ignore the “fragile structure of international adjudication”,⁹² particular the nature of the jurisdiction of the Court – the fact that the Court is consensual in nature, and the fact that it operates within a rather loose legal system. To amend the Statute in the manner suggested by Vern Clemons will further diminish the confidence of States to use the Court. No State will be pleased to relate with the Court as a sort of an international legislature which, by the single stroke of the gavel establishes a rule of law that becomes fixed. This will not go well with States, given that States are not pleased to be dictated to in that manner.⁹³ The danger in such a cause of action should remind us of the caution Brierly sounded long ago that “only to a small extent, and hardly at all in international law, can a society be confined within a legal mould that does not meet its needs, or what the prevailing opinion perceives to be its needs”.⁹⁴ Given that it can hardly be said that the express adaptation of *stare decisis* will meet the needs of States and of the international legal system as a whole, such an enterprise will indeed be a dangerous, if not a self-destructive one.

Besides, there is no real reason for the formal adoption of the English style, which the Court already appears to follow in several details except for the absence of *stare decisis*. It will be more rewarding for the Court and for States for the Court to copy the useful parts of the common law while yet bearing a mark of the civil law *jurisprudence constante* that develops the law through the process of judicial incremental accumulation. The court is in no position to strictly stick with either of the systems, it must remained entangled in the “the complexity

⁹² Schwebel, “Reflections” note 39, p. 1068 (stating that, “it is not surprising that so frail an institution as international adjudication not only has congenital weaknesses but also may have caught some of the diseases of its environment”, p. 1070)

⁹³ Andrew Coleman, “The International Court of Justice and Highly Political Matters”, 4(1) Melbourne Journal of International Law 29, 31 (2003) (“... sovereign States are reluctant to admit, and indeed on occasion even deny (where it suits their interests) the existence of higher political authority”)

⁹⁴ Brierly, “The Shortcomings”, note 51, p. 8

of its legal inheritance to exercise selectivity or eclecticism”.⁹⁵ The advantage of this approach was aptly pointed out by Ryan McGonigle, when he wrote: “The flexibility of mixed jurisdictions is found in their ability to act as a ‘doctrinal sieve,’ straining out the inherent weaknesses of both parent traditions”.⁹⁶

1.6 The Influence of the Decisions of the ICJ in the International Community of Proliferated Dispute Resolution Mechanisms

Once there was that the ICJ was the only permanent international court with jurisdiction over States. That state of affairs is so different from the situation today, where the international judicial space is now occupied by various courts/tribunals with different forms of jurisdiction over diverse subjects of international law. Some of these courts/tribunals are expressly permitted to apply international law as defined in article 38 of the Statute of the ICJ. This is in addition to the general agreement that article 38 is the most important statement of the sources of international law. This makes it imperative for a brief discussion of how the approach of the ICJ towards its case-law, in the face of the theoretical arguments that its decisions are not a source of international law, may affect those courts/tribunals, which are required to apply article 38. This is more intriguing as these other courts/tribunals lack an article similar in terms to article 59 of the Statute of the ICJ; a fact which strongly suggests that article 59 is redundant to article 38(1)(d).

It is refreshing to note that decisions of the ICJ still play a crucial role in the development of international law with considerable influence in other international courts/tribunals. The reason for this may be seen from three angles: first, the ICJ is a principal organ of the United Nations; second, the ICJ has a potentially general jurisdiction both in relation to subject-matter and parties in matters of general international law; the third is the growing tendency of

⁹⁵ John Tucker, note 66 p. 747

⁹⁶ Ryan McGonigle, note 15

States to direct international courts/tribunals to apply article 38 of the Statute of the ICJ. By so doing, the enabling instruments of the courts/tribunals do not only incorporate article 38(1), they also (arguably) incorporate decisions of the Court in matters of international law insofar as the decisions of the Court are a subsidiary means for the determination of rules of international law in article 38(1)(d). Examples of this approach are in the Supplementary Protocol of the Economic Community of West African States (ECOWAS) Community Court of Justice⁹⁷ and the United Nations Convention on the Law of the Sea (UNCLOS).⁹⁸ It is provided in article 19 of the Protocol of the ECOWAS Community Court of Justice that “the court shall also apply, as necessary, the body of laws as contained in article 38 of the Statute of the International Court of Justice”. Similarly, articles 73(1) and 83(1) of the UNCLOS direct the International Tribunal for the Law of the Sea (ITLOS) in cases involving the delimitation of the exclusive economic zone and the continental shelf between States with opposite or adjacent coasts, to be “international law, as referred to in article 38 of the Statute of the International Court of Justice”. These provisions are also applied by tribunals constituted pursuant to article 287, and in accordance with Annex VII of the UNCLOS.

In discussing the relationship between the ICJ and other international/courts and tribunals, it cannot be stressed enough that the role the ICJ can play in the activities of these other courts/tribunals cannot be totally excluded by the lack of a hierarchical structure in which decisions of the ICJ are binding on these other courts/tribunal. Its role emerges from the general influence of its precedents. Indeed, as pointed out by Judge Jessup, "the influence of the Court's decisions is wider than their binding force".⁹⁹

⁹⁷ The Protocol of the Community Court of Justice (Protocol A/P1/7/91) was signed on July 6, 1991, and entered into force on November 5, 1996. The Protocol was amended by Supplementary Protocol A/SP.1/11/04.

⁹⁸ December 10, 1982

⁹⁹ *Separate Opinion, Barcelona Traction, Light and Power Company Limited, (Belgium v Spain) (Second Phase)* ICJ Rep 1970, 3, 163, para 9

The present writer, however, acknowledges that there are no easy answers to the proper influence of the decisions of ICJ in the contemporary international judicial space.¹⁰⁰ This is in view of the absence of a hierarchical structure and the lack of a clear definition of the relationship between the ICJ and other international courts/tribunals. The principal question is whether “ICJ decisions have a special normative effect on the international plane as a result of its status [as the principal judicial organ of the United Nations], even though Article 38 speaks of judicial decisions in general and does not confer on decisions of the ICJ a hierarchic supremacy vis-a-vis judgments of other international courts?”¹⁰¹

The crucial problem that clear definition of the relationship between the ICJ and other courts/tribunals (in at least matters of general international law) will resolve is that of inconsistency of case-law, which invariably carries the larger implication of the fragmentation of rules/principles of international law. Commenting on this situation, Jennings noted that the proliferation of international courts/tribunals comes with the danger of the conflict of jurisdiction or contradiction in decisions, increasing the in-determination rather than the determination of law through the exercise of the judicial function.¹⁰² He argued:

In a developed system of tribunals, such as is to be found in most States, there are legally defined relationships between tribunals, whether in terms of legally defined subordination or legally determined independence. And there is usually one court at the top of a hierarchy, whether of appeal or of cassation. The ICJ, being the principal judicial organ of the United Nations, and moreover having a general jurisdiction over all questions of international law, would seem apt to fill this role. But there is the difficulty of Article 34(1) of the Statute, the problems arising from the separate histories of the specialized tribunals, and not least the regional character of several of them; and of course many problems of legal policy.¹⁰³

¹⁰⁰ Jennings, “The Role of the International Court”, note 45, p. 59 (He further thought “The problem however with this proliferation of new international tribunals is that it has been and is being done without any overall plan. The juridical relationship between these tribunals, if indeed it can be said that there be any, is yet to be discovered...”)

¹⁰¹ *Ibid*

¹⁰² *Ibid*, p. 61

¹⁰³ *Ibid*, 63

Sharing a similar thought, Gilbert Guillaume noted that the increase in the number of courts and arbitral institutions introduces the question whether precedents from one dispute settlement institution are relevant to others. He observed that the question arises when two courts or tribunals apply treaty and when they apply general international law.¹⁰⁴

On a general note, given the problems that may arise from incoherency of case-law from various international courts/tribunals on a particular question of law, there are good reasons to worry about the approach of these courts/tribunals towards their own case-law and those of other courts.¹⁰⁵ It should, for instance, be worrisome to note the conflict of opinions between the ICJ and the International Criminal Tribunal for former Yugoslavia (ICTY) on the test for determining the international responsibility of States for the use of force against another State by private actors: while the ICJ hinged its “control test” on the complete dependence of private actors on the State aiding them,¹⁰⁶ the ICTY played down the requirement of complete dependence. It held that the control test could be fulfilled even where the private actors had autonomous choices of means and tactics while participating in a common strategy along with the controlling State.¹⁰⁷ The Appeals Chamber in *Prosecutor v. Tadic*¹⁰⁸ was clearly of the view that the “effective control” test enunciated by the ICJ was not persuasive, for the following reasons: (a) the *Nicaragua* “effective control” test did not seem to be in consonance with the “very logic of the entire system of international law on State

¹⁰⁴ Gilbert Guillaume, “The Use of Precedent”, note 81, 5

¹⁰⁵ Guillaume, *Ibid*, p.7 (arguing that the increase in the number of courts/tribunals has led to increased attention to the issue of precedent in international law. This, he noted involved investigating the extent to which each court/tribunal make use of its own precedent and those created by other courts/tribunals. The first, he argued implicates legal certainty in a given field and the second, the coherence of international law in its entirety.)

¹⁰⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States)* Merit, ICJ Rep 1986, 14, 63, para 111; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia Herzegovina v. Serbia Montenegro)*, ICJ Rep 2007, 43, 141, para 393-394.

¹⁰⁷ See *Prosecutor v. Zejnir Delalic*, ICTY Appeals Chambers, 20 February 2001, para 47, citing *Prosecutor v. Tadic*, with approval. see A.O. Enabulele, Use of Force by International/Regional Non-State Actors: No Armed Attack, No Self Defence 12 (3-4) European Journal of Law Reform, 209 (2010), A.O. Enabulele, Prohibition of the Use of Force, the Rising Activities of Militias and the Dilemma of the ICJ: Are Articles 2(4) and 51 of the United Nations Charter in Need of Reconsideration? 4(2) Journal of Africa and International Law, 287 (2011), and Tom Ruys & Sten Verhoeven, “Attacks by Private Actors and the Right of Self-Defence”, 10(3) J.C & S.L 289, (2005), for a further discussion of these tests.

¹⁰⁸ Judgment of January 26, 2000. See *Prosecutor v. Zejnir Delalic*, *ibid*, para 16-25 for the analyses of the view of the *Tadic* Court and the case-law of ICTY in general, as it relates to the *Nicaragua case*.

responsibility”, which is “not based on rigid and uniform criteria”; and (b) that the *Nicaragua* test is at variance with judicial and State practice.

Aside the general uncertainty that may pervade certain questions of international law, another serious problem that may arise from incoherent case-law is forum shopping. States which have access to two or more international courts/tribunals, having overlapping jurisdictions, will each want to go before the court/tribunal that its case-law favours her course on the contentious issues, where the different courts hold contrary views.¹⁰⁹ This would in turn lead to conflicting judgments and unhealthy rivalries between the courts/tribunals involved, and indeed fragmentation of the law and uncertainty. There already are instances where each of two contending States expressed interest in bringing a case before different tribunals. The following instances were recorded by Gilbert Guillaume:

the case for interstate relations in the swordfish dispute between the European Union and Chile, which the former wished to bring before the International Tribunal for the Law of the Sea, and the latter before the World Trade Organization. It was also the case in the arbitration between Ireland and the United Kingdom concerning the Mox Plant where the International Tribunal for the Law of the Sea ... and the European Court of Justice were involved. We frequently see this in disputes over investment that could be submitted to either ICSID tribunals or to the dispute settlement bodies provided for in the contracts.¹¹⁰

Though Guillaume gave no indication that this situation was brought about by conflicting case-law, it goes without saying that no State would want to go before a court whose case-law is adverse to her case, when the case-law of an equally competent court supports her case. This is particularly against the lack of a hierarchical structure between the courts, as a result of which each court claims autonomy in their various sphere of competence: a

¹⁰⁹ For instance, Article 287 of UNCLOS gives State parties to the Convention the right to choose one or more of the following means for settlement of disputes: (a) ITLOS; (b) ICJ; (c) arbitral tribunal constituted in accordance with Annex VII; (b) a special arbitral constituted in accordance with Annex VIII for one or more of the categories of disputes specified therein.

¹¹⁰ Gilbert Guillaume, “The Use of Precedent”, note 81, p. 18.

competence sometimes shared with another court/tribunal equally operating a sense of autonomy.¹¹¹

It is important to state that it will be vain to hope for, and unrewarding to achieve a complete coherence of opinions by all the multiple international courts/tribunals existing today. We can only hope for coherence at different jurisdictional layers of international courts/tribunals: these are inter-state layer, human rights' layer and the layer of international criminal law. It is possible and perfectly in order for supranational courts operating at the layer of human rights to take a different view from that taken by an international court operating at the inter-state layer. It is well possible that the individuality element of the case may require the former court to apply a rule differently from the way it would be applied in inter-state claims, in order to do justice respecting the peculiarity of the instrument it is established to apply.

This, perhaps, was the consideration in *Loizidou v Turkey*¹¹² where the European Court of Human Rights (ECHR) would not follow the practice of the ICJ on the rules governing reservations to the jurisdiction of the ECHR. The ECHR accepted that article 46 of the European Convention of Human Rights and Fundamental Freedoms was modelled after article 36 of the Statute of the ICJ and that States can attach restrictions to the jurisdiction of the ICJ. Nonetheless, it held that it did not follow that restrictions to its jurisdiction must also be permissible under the European Convention.¹¹³ The ECHR based its view on the fact that “the context in which the Court [ICJ] operates is quite distinct from that of Conventions instructions”.¹¹⁴ In a similar vein, the argument that “the ICTY's competence is limited to

¹¹¹ This was the point clearly made by ICTY, when urged to hold that decisions of ICJ was binding on it. According to the Tribunal, “the tribunal is an autonomous international judicial body, and although the ICJ is a ‘principal judicial organ’ within the United Nations system to which the tribunal belongs, there is no hierarchical relationship between the two courts” – *Prosecutor v. Delalic*, note 111, para 24

¹¹² *Preliminary Objections (Application no. 15318/89)*, Judgment of March 23, 1995

¹¹³ *Ibid*, p. 24, para 84

¹¹⁴ *Ibid*, p. 24, para 85

establishing individual criminal responsibility” was the basis on which the conflict of opinions between the ICJ and the ICTR on the “control test” has been rationalised.¹¹⁵

Even the ICJ had in effect indicated that the specificity of the instrument establishing a court/tribunal may make it impossible for their decisions to give rise to generalisation.

According to the Court:

The parties have relied also on the general arbitral jurisprudence which has accumulated in the last half a century. However, in most cases the decisions cited rested upon the terms of instruments establishing the jurisdiction of the tribunalsand determining what rights might enjoy protection; they cannot therefore give rise to generalization going beyond the special circumstances of each case.¹¹⁶

This is not to wish away the fact that there are certain concepts of law and justice that require the same application, irrespective of the jurisdictional layer of international adjudication applying them. In relation to such instances, it is expected that international courts maintain coherency in order to sustain the integrity of the law. Nonetheless, it cannot be stressed enough that international courts need not maintain coherency at the expense of applying fresh insights to erroneous precedents.¹¹⁷ It should be obvious from academic literatures and even from dissenting opinions that the ICJ has not always been right. The ICJ is fallible and all other international courts/tribunals should see themselves at liberty to take a different view when a rule/principle adopted by the ICJ has lost legal credibility, no matter how established a particular view is in the case-law of the ICJ.

What should be hoped for, therefore, is coherence at the different layers of international adjudications. The following are a few examples: the European Court of Human Rights; the

¹¹⁵ Ruys & Verhoeven, note 107, p. 301. The ICTY Appeal Chamber in *Prosecutor v. Delalic*, note 107, para 36, clearly affirmed the ground for which the Trial Chamber in *Prosecutor v. Tadic*, Trial Judgment, para 230, refused to rely on Nicaragua. The *Tadic Trial Chamber* had noted that, although “this [Nicaragua] decision by the ICJ constitutes an important source of jurisprudence on various issues of international law,” the ICJ is ‘a very different judicial body concerned with rather different circumstances from the case in hand’.

¹¹⁶ *Barcelona Traction case*, note 99, p. 40 para 63

¹¹⁷ For legal precedent in international dispute settlement is neither to be worshipped nor ignored – Gilbert Guillaume, “The Use of Precedent”, note 81, p. 5

Inter-American Court of Human Rights; and the ECOWAS Community Court of Justice, should maintain coherence on the application of the general concept of human rights; the International Criminal Court (ICC); the International Criminal Court for Rwanda (ICTR); and the ICTY, should all maintain coherence on the general ingredients of individual criminal responsibility; while the ICJ and all other Courts and tribunals exercising inter-state jurisdiction should maintain coherence on general questions of international law. There could, however, be a vertical coherence in matters of general international law, drawing from the ICJ as the principal judicial organ of the United Nations.

It is apposite to observe that the inconsistency of case-law between the ICJ and international courts/tribunals occupying a different layer of international law does not dampen the role of the precedent of the ICJ in those other courts in matters of general international law. This is more so when considered against the fact that supranational courts equally have inter-state jurisdiction, which makes their application of general international law to disputes inevitable. It should be expected that a supranational court dealing with matters of general international law will readily be influenced by the precedent of the ICJ. This will particularly be expected with the ECOWAS Community Court, which applies the law specified in article 38(1) of the Statute of the ICJ. On this, *Thomas Buergenthal* is equally confident. According to him:

The international judicial system in existence today is not hierarchically integrated in that no court in the system is formally superior to any of the others. I am not sure that this is necessarily detrimental to the development of international law. For, to the extent that it permits greater lawmaking creativity within the international judicial system and by courts comprising that system, it is likely to strengthen international law. At the same time, let us not forget that there exists an informal hierarchy which comes into play when one or the other of these international courts finds it necessary to apply general international law in the exercise of its functions. In such situations, it will in general look first to the jurisprudence of the ICJ.¹¹⁸

¹¹⁸ Buergenthal, note 48, p. 405

The view of *Thomas Buergenthal* has great appeal when considered in the light of the stabilising role the decisions of the ICJ play in decisions of other international courts/tribunals (within the layer of inter-state conflicts) when deciding a matter similar to the one decided in a precedent of the ICJ. The cases decided by the ITLOS and other tribunals constituted pursuant to article 287, and in accordance with Annex VII of the UNCLOS testify to this role.

In the *Arbitration regarding the Iron Rhine (IJZERN RIJN) Railway*,¹¹⁹ the Arbitrators relied on (*Kasikili/Sedudu Island*¹²⁰ and *Sovereignty over Pulau Ligitan and Pulau Sipadan*,¹²¹ to hold that articles 31 and 32 of the Vienna Convention on the Law of Treaties reflected pre-existing customary international law, and are generally applicable to treaties concluded before the entering into force of the Convention. Also, following articles 73(1) and 83(1) of its Statute, the ITLOS held, in the *Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal*, that the decisions of international courts and tribunals referred to in article 38 of the Statute of the ICJ are also of particular importance in determining the content of the law applicable to maritime delimitations under articles 74 and 83 of the Convention.¹²² Accordingly, the Tribunal declared:

In examining this issue, the Tribunal notes “the principle that the land dominates the sea through the projection of the coasts or the coastal fronts” (*Maritime Delimitation in the Black Sea (Romania v. Ukraine)*, *Judgment, I.C.J. Reports 2009*, p. 61, at p. 89, para. 77). As stated by the ICJ in the *North Sea cases*, “the land is the legal source of the power which a State may exercise over territorial extensions to seaward” (*North Sea Continental Shelf, Judgment, I.C.J. Reports 1969*, p. 3, at p. 51, paragraph 96).¹²³

The tribunal practically relied on decisions of the ICJ in various aspects of the case.

¹¹⁹ *The Kingdom of Belgium and the Kingdom of Netherlands*, Award of May 24, 2005.

¹²⁰ (*Botswana v. Namibia*), ICJ Rep 1999, 1045

¹²¹ (*Indonesia v. Malaysia*, ICJ Reps 2002, 625

¹²² (*Bangladesh v. Myanmar*), Award of March 12, 2012, p. 61 para 184

¹²³ *Ibid*, pp 61-62, para 185

The same approach was manifested in *the Award of Arbitral Tribunal between Barbados v. the Republic of Trinidad and Tobago*.¹²⁴ Here, the Arbitral Tribunal cited articles 74(1) and 83(1) of UNCLOS¹²⁵ as its empowerment for copious reliance on decisions of the ICJ in maritime delimitation cases. Same was the *Award of the Arbitral Tribunal in Guyana v. Suriname*.¹²⁶ Here, the Tribunal relied on articles 74(1) and 83(1) of UNCLOS to admit that it had “to be guided by the case-law as developed by international courts and tribunals in this matter”.¹²⁷ In doing this, the Court called in aid, “The case law of the International Court of Justice and arbitral jurisprudence as well as State practice ...”.¹²⁸ Again the Tribunal copiously relied on the decisions of the ICJ.¹²⁹

The present view, therefore, believes time beckons on us all to focus on the immediate problems confronting modern international law as a result of the proliferations of international court/tribunals. The focus of scholars should not continue to labour under the question of whether judicial decisions are a source of international law; our focus should now be on the identification of the factors that should operate to guide the courts in their use of precedent. Scholars should worry over the fact that the lack of a formal hierarchical structure would unavoidably create a problem of incoherent international case-law in some areas, and unhealthy rivalries between some courts/tribunals in future. But in all, our worries should seek comfort in the fact that international law can actually converge at different layers; scholars and judges should pursue this as the solution to the problems arising from proliferation of international courts/tribunals. One way of doing is to recognise what international courts actually do with their ardent commitment to consistency of approach – they make law.

¹²⁴ Decision of April 11, 2006, RIAA, Vol XXVII

¹²⁵ *Ibid*, para 221

¹²⁶ Award of September 17, 2007. This Tribunal was constituted pursuant to article 287 and Annex VII of UNCLOS.

¹²⁷ *Ibid*, p. 108 para 334

¹²⁸ *Ibid*, p. 110, para 342

¹²⁹ *Ibid*, p. 125, para 390

In concluding this section, it could be said that though the role of the ICJ in law application in contemporary international law is not quite as robust as it should be due to the limitations discussed above, the proliferation of international court/tribunals comes with the advantage (albeit unnoticeable) of the court playing an indirect but crucial role in the maintenance of coherency in area of general international law through its precedents. It also allows for a comparative approach that reveals the manner by which other international courts/tribunals (particularly those applying article 38 of the Statute of the ICJ) relate with their precedents.

1.7 Should the ICJ be involved in Law Making?

When speaking of the ICJ and of international law, in general, it is commonplace to start by using municipal courts and municipal law analogies, if for nothing else, for the purpose of elucidation and comparison. In no other field of international law is it more apposite to view progress through the prism of municipal law than in the area of judicial settlement of disputes. This is because the shared aims of judicial settlement of disputes in both systems is the entrenchment of the rule of law and the achievement of peaceful co-existence as a viable alternative to anarchy in the resolution of conflicting claims and interests. As discussed above, though, theoretically speaking, the civil law system differs from the common law in regards to judicial lawmaking, both systems ultimately accept, if not tolerate judicial lawmaking.

The question relating to the propriety of judicial legislation is expectedly much more complex in international law, where the first lesson students commit to heart is that States are the makers of international law. If States are the makers of international law, how then can it be admitted that judges also make international law? But if international judicial legislation was traditionally unthinkable, or perhaps, rare; it became firmly established with the creation of the PCIJ and its continued existence through the ICJ. Though the traditional view is now

being seriously challenged as international law progresses, it is still largely the case that international lawmaking other than those made by States exist only as exception to the general rule that States are the only makers of international law through conventions and customs. This, together with the unhelpful language of article 38(1)(d), has created a huge challenge for any possibility of there being a general concurrence on the juridical relevance of the case-law of the ICJ in relation to article 38(1)(d) of its Statute.

The above, notwithstanding, it must equally be acknowledged that the international community of today has grown in ways that may not have been imagined when the Statute of the ICJ was crafted in 1920 (PCIJ) and 1945. Under that dispensation, it could not have been expected that the Court be granted capacities which it could not realistically exercise. How unthinkable was it in 1920 for individuals and international organisations to have direct access to an international court/tribunal; how unrealistic was it for international law and municipal law to mutually regulate areas that once were the exclusive preserve of municipal law. The international law of today and the community in which it operates are different; there has been a progressive movement from the old era to one that now admits the capacity of individuals and international organisations to bring international claims; one that accepts the convergence of municipal law and international law in many respects; one in which States are more willing to commit to the creation of specialised courts/tribunals and empower them with compulsory jurisdiction; one in which States allow international organisations to make binding rules of international law. The liberalisation of the international sphere in the manners just mentioned (and when viewed against the point made later in this work about the reliance States place on the decisions of the ICJ), questions the continued relevance of the argument that States alone are the makers of international law.

The point should be made, though, that it is not the liberal approach of contemporary international law that accounts for lawmaking in the ICJ in that as way back as the time of the PCIJ, when the statist approach still held sway, judicial lawmaking was already a feature of the Court. The reality of contemporary international law has only made judicial lawmaking more acceptable. The main reason for the inevitability of lawmaking through the Court is the very fact that there is no international legislation to refine rules of international law, which as at the time of the making of the court were mostly vague and indeterminate. Though rules of international law cannot be said to be in the state they were in 1920, it yet cannot be disputed that modern international law rules (rules of custom in particular) still suffer the problems of vagueness, indeterminacy and contradiction,¹³⁰ especially in areas where State practice has been sparse, vague and contradictory.¹³¹

This explains why it was envisaged from the start that it will be the function of the Court to ripen custom and bring about a more complete definition of international law which the framers of the Statute agreed was badly defined, prior to the emergence of the PCIJ.¹³² Under these circumstances, and as envisioned by the framers of the Statute of the Court, it is inevitable that judgments of the Court crystallise hitherto uncertain, vague or contradictory rules into concrete rules of law. This point was also made by John Gardner, who argued that with the vagueness of international law, it was almost inevitable that judgments and opinions of the international ICJ are forming and would continually form precedents.¹³³

If the theoretical standing that decisions of the Court were not a source of law was the prevailing view in practice, the Court would have been hampered in the performance of its duty of 'decide disputes'. This is even so in areas covered by treaties, as no written law can

¹³⁰ Lauterpacht, *Function of Law*, note 5, p. 75

¹³¹ The relationship between case-law and customary international law is discussed in some details in chapter four.

¹³² See the discussion of the preparatory work of the Statute in chapter two. In particular, see pp. 64-65.

¹³³ John Gardner, note 61, p. 17

fully contemplate all eventualities that may arise as the subjects of the law begin to interact with the written law. Indeed the incompleteness of international law as is also the situation in municipal law, reveals itself in the inability of the law to cater for all factual unforeseen eventualities that may arise in the application of the law to concrete facts. It is always the province of the judge to supply the minute but vital links between the written law and the facts of the case at hand. It is only the elasticity of legal rules by judicial reasoning that guarantees the complete application of the written law, when confronted with unforeseen eventualities.¹³⁴

As noted by Robert Jennings, it is, however, incumbent on judges of the ICJ to be conscious of the fact that their primary duty is to decide dispute – article 38(1) – and not to make law. The temptation she must resist is to strive to use every case to expand the law in the direction she thinks the law should go. In his thoughtful reflections, Jennings noted that the source of judicial authority is the law and that judges are by their appointment given a remit to interpret the law and apply it to the settlement of cases that come before them.¹³⁵ In his words:

Thus, the good judge will remember that the distinction between *jus dicere* and *jus dare* remains crucial to the authority of the tribunal even though the boundary between them is not always a clear one, and may shift from one context to another. It is well, therefore, for the judge constantly to have in mind certain imperatives that should be observed, and which provide a kind of frame within which a court should operate. The first is the proper observance of the principle that the *primary* task of a court of justice is not to 'develop' the law, but to dispose, in accordance with the law, of that particular dispute between the particular parties before it. This is not to say that development is not frequently a secondary part of the judge's task to develop the law. And it is to say that any 'development' should be integral and incidental to the disposal according to law of the actual issues before the court. For the strength of 'case law' is precisely that it arises from actual situations rather than being conceived *a priori*. Any idea that an international court, in dealing with a dispute brought and argued before it, ought to labour under an assumption that it has a primary duty to take the opportunity to

¹³⁴ Hersch Lauterpacht and C.H.M Waldock, *The Basis of Obligation*, note 25, p 97-98. (Asserting that no conception of the nature of law and the judicial function could be more misleading than perceiving that a system of law is a sort of armoury of rules out of which the judge merely selects the one that most nearly fits the facts of the case before him. In consequence, Brierly concluded that to construct a perfectly comprehensive and perfectly unambiguous system of law has often been the dream of law reformers.)

¹³⁵ Jennings, "The Role of the International Court", note 45 p. 39

'develop and clarify' the law, is hardly one calculated to encourage the submission of disputes to such a procedure; especially so since the jurisdiction of an international court in contentious cases depends in principle upon a consensual acceptance by the parties to its exercise.¹³⁶

This should, however, not be understood to mean that the cautious judge is one who is too shy or timid to introduce innovations to the law in the course of adjudication. Experience shows that it may sometimes serve the law worse to interpret it in its literal terms when that may defeat the purpose and spirit of the law, than to apply the law with certain degree of innovation, notwithstanding that the innovation may tend to obliterate the differences between law-application and lawmaking in any particular case.

The approach of the ICJ in the *Corfu Channel case*¹³⁷ and the *Reservations to the Convention on Genocide*¹³⁸ will buttress this point. In the former, the Court relied on what it called the “elementary consideration of humanity” as the legal consideration for holding Albania liable for a minefield within its territorial waters.¹³⁹ In the *Reservations advisory opinion*, the Court held that the consequence of the intention which informed the origin of the Genocide Convention to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups; a denial which shocked the conscience of mankind and which is contrary to moral law, was that the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.¹⁴⁰ In other words, the principles underlying the crime of genocide are binding on States outside the positivists modes of lawmaking, because genocide ‘shocks the conscience of mankind’. If the Court was timid in these cases, Albania would have escaped liability for her wrongful act, as would other States, regarding international responsibility for acts of genocide. Whether all States actually accept

¹³⁶ *Ibid* p. 41

¹³⁷ (*United Kingdom v. Albania*) 1949 ICJ Rep, 4

¹³⁸ Advisory Opinion, ICJ Rep 1951, 15

¹³⁹ Note 137, p 22

¹⁴⁰ Note 138, p. 23

the basis of liability contained in these decisions is another question entirely, but the question, however answered, does not prevent the rule contained in the cases from passing into general international law.

Be that as it may, the point cannot be stressed enough that when developing the law, the Court should not consider itself at liberty to develop the law in the direction that neither corresponds with the expectations of States, nor befits the circumstances of the case and the needs of society. For this observation, the *Nuclear Test cases*¹⁴¹ provide a useful example. In the case, the seeming adaptation of the English rule of unilateral contract, in a manner reminiscent of (though not completely identical to) the approach of the English court in *Carlill v Carbolic Smoke Ball Company*,¹⁴² did not quite work well. The ICJ had ascribed obligations of a legal nature to unilateral statements made by France. The reasoning of the Court in the cases could hardly be said to correspond with the expectations of Australia and New-Zealand and the general expectations in international law at the time.¹⁴³

Another factor that favours the incidental lawmaking power of the Court is the argument strongly made in chapters two and seven that there is no room for *non-liquet* in the Statute of the Court. This follows the argument in chapters two and seven, that rather than declare *non-liquet*, the Court is enabled by article 38(1)(c) to find solutions from general principles of law and adapt them to international law. There are academic and judicial opinions to the effect that whenever the Court adapts private law principles to suit international law, the Court makes a new law. It could be implied from this observation (in support of the point made in chapter two) that the framers of the Statute did give the Court some lawmaking powers through article 38(1)(d). On the other hand, if *non liquet* was a feature of the court, the

¹⁴¹ *Nuclear Tests Case (New Zealand v France)*, ICJ 1974, 457; *Nuclear Tests Case (Australia v France)*, ICJ Reps, 1974, 253

¹⁴² [1893] 1 QB 256 CA

¹⁴³ See Amos O. Enabulele, "The Aura of Unilateral Statements in International Law: Nuclear Tests Cases Revisited", 6(1) *Hanse Law Review*, 53 (2010)

situation would have been different. The court would have been compelled to refuse to decide any case for which there are no pre-existing rules of law for the resolution of the questions raised in it, as the court is widely believed to have done in the *Legality of the Threat or Use of Nuclear Weapons*.¹⁴⁴

This is in addition to the very fact that the ICJ is a permanent international court of justice as distinct from an arbitral tribunal.¹⁴⁵ Unlike arbitral tribunals, where the parties have control over the appointment of the arbitrators and of the proceedings, the Judges of the ICJ have a fixed tenure. This makes them less susceptible to the influence and control of litigating States. The character of permanence of the Court and of the fixed tenure of office for its judges¹⁴⁶ is important to the scheme of this work. It allows the judges to perpetuate the case-law of the Court in an unbroken manner by maintaining that consistency that will eventually settle the rules/principles adopted by the Court.

What is even more telling is the general agreement that article 38(1)(d) encompasses the decisions of both municipal courts and other international courts. As stated later in this work, this questions the rationale for arguing that the ICJ judgments cannot be a source of law even for the court, when it is generally agreed that decisions of other courts are a source of law.

Having made these necessary preliminary points, it is apposite to emphasise that the core argument of this study is that the ICJ plays a vital role in the enunciation, development and refinement of principles and rules of international law. It is argued that this purpose was envisaged in the preparatory work of its Statute; it is accepted by States, and also that the purpose is continuously fulfilled in the practice of the Court. It is also shown that the benefit of the Court sitting on the shoulders of both the common law and civil law systems of law is constantly revealed in its liberty (absent the formal prescription of the common law and

¹⁴⁴ ICJ Rep 1996, 226. The seeming *non liquet* aspect of this case is exhaustively discussed in p. 305-309 of this work.

¹⁴⁵ For an exhaustive discussion of the differences between the ICJ and arbitral tribunals, see Jennings, "The Role of the International Court" note 45, p 5-9

¹⁴⁶ By article 13 of the Statute of the Court, judges are elected for nine years tenure at the first instance.

absent the formal prohibition of the civil law) to enjoy the best of both systems by accepting that while it should be consistent in its decisions, it should not regard the rules/principles arising from its decisions as settled by a single judgment. The conclusion reached is primarily obtained from the case-law of the Court, which reveals the application of principles enunciated in judicial decisions to concrete cases.

In order to position the present view correctly, this work is not confined by the argument that equates judicial lawmaking with the common law doctrine of *stare decisis*. While drawing the necessary analogy between the practice of the Court and the common law doctrine of precedent, this work seeks to understand what the Court tries to achieve by following its previous decisions in the manner that largely replicates the approach of common law courts. While acknowledging the distinction between consistency and the doctrine of precedent, it is argued that the Court follows its precedent, not for the purpose of adopting *stare decisis*, or just for the maintenance of consistency, but because it has identified judicial decisions as the repository of rules/principles which it wants to follow.¹⁴⁷ Though (and this is regrettable) the Court is unable to do this in all the cases due to other intervening elements which could be political as was in the South West Africa cases, or which could be the desire of the Court to uphold or promote the enforcement of certain fundamental aspects of international law, as exemplified in the line of cases trailing the status of the former Yugoslavia in the United Nations as they pertained to the enforcement of the Genocide Convention.¹⁴⁸ Nonetheless, the practice of relying on its precedent is substantially maintained. Such cases, which are few and far apart, notwithstanding, the writer strongly argues that to the extent that decisions of the

¹⁴⁷ The writer has been vitally assisted in shaping his view by Dworkin's analysis of legal rules and principles in Ronald Dworkin, "The Model of Rules", 35 U. Chi. L. Rev. 14 (1967-1968). The writer is aware of the controversy surrounding Dworkin's thesis, nonetheless, the writer finds his comprehensive discussion of rules and principles instructive to the approach adopted in this thesis. One remarkable thing, though, is that the controversy does not appear to challenge the fact that the terms legal rules and legal principles are ultimately laws through the activities of courts. – see Joseph Raz, "Legal Principles and the Limits of Law", 81 Yale L.J. 823, 843 (1972) (arguing that "many legal systems recognize that both rules and principles can be made into law or lose their status as law through precedent".)

¹⁴⁸ These cases are discussed in pages 166-168 and 158-163 of this work.

Court become synonymous with the emergence of rules/principles of international law, they are a source of law; their supplementary character of judicial decisions in article 38(1)(d) of the Statute of the Court, notwithstanding.

1.8 Preview of Chapters

This thesis is divided into eight chapters. Chapters one and eight are the introductory and concluding chapters respectively.

Chapter two examines the preparatory work of articles 38(1)(d) and 59 of the Statute of the Court. It comes to the conclusion, contrary to the view of some writers, that there are no clear indications that the Drafters did not envisage the use of judicial decisions as a source of international law. Chapters three, four and five discuss article 38(1). Chapter three examines the text of the provision; chapter four discusses the practice of the Court relating to the provision while chapter five looks into the relationship between judicial decisions and customary international law. In all, it is the writer's view that the text of the provision and the uses of judicial decisions in the decision making process of the Court confirm the conclusion reached in the thesis that judicial decisions are a source of international law.

Chapter Six discusses article 59 through the case-law of the Court. It shows that neither the Court nor States have ever invoked article 59 in relation to judicial decisions. Rather, that article 59 has been mostly used in relation to the right of intervention and the protection of third party rights. Accordingly, it was argued that the article does not possess the effect generally ascribed to it by text writers. Chapter Seven focuses on instances of judicial legislation by the ICJ. It discussed *non liquet* and the various guises employed by the Court to make judicial legislation less conspicuous.

Chapter Two

History and Original Intent: Articles 38(1)(d) and 59 Considered.

2.1 Introduction

The question concerning the power of a court to create a new rule of law of relevant content, in the event of a court being presented by a claim which is not covered by a rule of positive law is directly related to the question of the authority of judicial decisions within a particular legal order. The question goes beyond the intrinsic merit of the substantive content of a rule created by a court; it challenges the very source; its foundation and of course the legality of the exercise of judicial power on such occasions. For the exercise of judicial power and indeed the rule that emerged from that exercise to be valid, it must draw its force from a recognised source of law within a given system. In the words of Hans Kelsen:

The assumption that the law-applying organs are authorised to fill such gaps, by applying to the particular case norms other than those of existing conventional or customary international law, implies that the law-applying organs have the power to create new law for a concrete case if they consider the application of existing law as unsatisfactory. From the point of view of legal positivism, such a law-creating power must be based on a rule of positive international law.¹

It follows, therefore, that the question whether a court can create a rule of relevant content to fill a gap in positive law is, in essence, a question of the sources of law.

This explains why the question relating to the power of the International Court of Justice (ICJ) to modify or create rules of international law implicates begins and ends in article 38(1) of its Statute. Article 38(1) prescribes the sources from which the international law to be applied by the Court shall emerge. It provides:

¹ *Hans Kelsen, Principles of International Law*, 439 (2nd edn., Robert W Tucker ed., 1966 Holt, Rinehart and Winston, Inc.)

1. *The Court, whose functions is to decide in accordance with international law such disputes as are submitted to it, shall apply:*
 - (a) *International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;*
 - (b) *International customs, as evidence of a general practice accepted as law;*
 - (c) *The general principles of law recognized by civilized nations;*
 - (d) *Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.*

Given that the Court has been expressly obligated to apply only the rules proceeding from the sources contained in article 38(1), it has to be seen that judicial decisions in its paragraph (d) are a source of law for there to be legal justifications for decisions rendered by the Court outside the provisions of positive law.

Although article 38(1) expressly mentioned judicial decisions in its paragraph (d), the difficult language of that paragraph has created more controversies than consensus. In particular, the reference to judicial decisions “as subsidiary means for the determination of rules of law”, and the incorporation of article 59 into article 38(1) by reference, foreclosed all possibilities of easy answers to the controversies. Article 59 provides: “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case”. The ambiguous wording of the provisions has made it impossible to understand its true import in the natural and ordinary sense. This is particularly against the backdrop that the direction of the practice of the Court is far removed from what a majority of Scholars subscribe to as the natural and ordinary meaning of the provision. The majority view is that judicial decision as a source of law is not tenable on the wording of the provision. This argument is always reinforced by reliance on article 59.²

² See Ian Brownlie, *Principles of Public International Law*, 21 (7th ed. Oxford University Press, 2008); Godefridus J. H. Hoof, *Rethinking the Sources of International Law*, 169 (Kluwer: the Netherlands 1983); Shabtai Rosenne, *The Law and Practice of the International Court*, 611 (Vol. 2 A.W. Sijthoff-Leyden 1965); Antonio Cassese, *International Law*, 159 (Oxford University Press, 2001), to mention a few.

2.2 Adherence to Natural and Ordinary Meaning of Words except Good Cause to do Otherwise

It is a sound approach to the interpretation of a treaty to begin with the natural and ordinary meaning of the wording of the treaty.³ This is a cardinal rule of interpretation; it proceeds on the understanding that words must be interpreted in good faith in the sense which they would normally have in their context.⁴ If so read they make sense, the natural meaning of the words would prevail.⁵ If, on the other hand, the words are ambiguous or lead to an unreasonable result, the Court would resort to other methods of interpretation to seek to ascertain what the parties really meant when they used the words under consideration.⁶ It would, therefore, be self-evident that it is equally sound and most essential, to go beyond the language of an instrument where language continuously yields itself to ambiguous results. In such a case, the history of the provision and how the provision has evolved in practice are alternative means of discovering the true meaning of the instrument. This is in tandem with article 32 of the Vienna Convention on the Law of Treaties, which provides:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of [its ordinary meaning in] article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

This approach was emphasised by Judge Percy Spender in his Separate Opinion in *Certain Expenses of the United Nations*,⁷ where he acknowledged that the first task of the Court is to look, not at the preparatory work or the practice which hitherto had been followed, but at the

³ In *S.S Lotus*, Series A, No. 10, 1927, 16 the PCIJ held that “there is no occasion to have regard to preparatory work if the text of a convention is sufficiently clear in itself”.

⁴ Article 31(1) of the Vienna Convention on the Law of Treaties 1969; *Polish Postal Service in Danzig*, PCIJ., Series B, No. 11 p. 39

⁵ *Competence of the General Assembly Regarding Admission to the United Nations*, ICJ Reps 1950, 4, 8

⁶ *Ibid*

⁷ Advisory Opinion: ICJ Rep 1962, 151, 185

terms of a treaty itself. The Judge was emphatic on the point that if the meaning of any particular provision, read in its context, is sufficiently clear to satisfy the Court as to the interpretation to be given to it, there will be neither legal justification nor logical reason to have recourse to either the preparatory work or practice.⁸ The corollary of this view is that recourse to practice and preparatory work becomes logically viable where a provision is not sufficiently clear when read in its ordinary and natural sense.⁹

2.3 Does Article 38(1) Call for an Examination of Preparatory Work?

Recourse to preparatory work is of particular importance to the present study, not only because the provisions in focus are not sufficiently clear, but also because some respected Commentators have relied on the preparatory work of article 38(1) to arrive at conflicting interpretations of the provisions. To mention a few: Brownlie¹⁰ and Hoof¹¹ based themselves on the preparatory work of the Statute to justify their view that judicial decisions are not a source of international law. On the other hand, Lauterpacht¹² and J.H.W. Verzijl¹³ argued to the contrary. They argued that there is nothing in the text of articles 38(1)(d) and 59 affecting the authority of judicial decisions. This situation presents an added imperative for the present writer to analyse the history of the provisions in order to set his work on a solid footing.

⁸ *Ibid*

⁹ It is questionable, as observed by Lauterpacht, whether the wording of a treaty over which each of the parties before the Court contend for diverse interpretations can actually be said to be sufficiently clear. For, if it was actually clear why would the parties see it differently? See Hersch Lauterpacht, "Some Observations on Preparatory Work in the Interpretation of Treaties", 48 Harv. L. Rev. 549, 572 (1934-35).

¹⁰ Note 2

¹¹ Note 2

¹² Hersch Lauterpacht, "The So-called Anglo-American and Continental Schools of Thought under International Law," 12 Brit Y.B. Int'l L 31 (1931); Hersch Lauterpacht, *The Development of International Law by the International Court* (London Stevens & Sons Ltd, 1958)

¹³ J.H.W. Verzijl, *The Jurisprudence of the World Court: A Case to Case Commentary*, 22 (Vol. 1 A.W. Sijthoff – Leyden 1965)

2.4 The Scope of the Preparatory Work to be considered

This discussion is largely a discussion of the history of article 38 of the PCIJ Statute. Save for minor alterations in 1945, that article is the same as article 38(1) of the Statute of the present Court. The only difference in the provisions is the inclusion of the term, “[t]he Court whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply....”, in the opening sentence of article 38 of the present Court. Similarly, and without any difference, article 59 is common to the Statutes of both Courts.

On a general note, the ICJ is a continuation of the PCIJ. This continuation is reflected in its Statute, jurisdiction and case-law; the jurisdiction¹⁴ and the case-law of the PCIJ are assimilated to those of the ICJ.¹⁵ The substantial similarities of the two Courts have been variously affirmed in the case-law of the ICJ. In *Military and Paramilitary activities in and against Nicaragua*, it was the view of the Court that the primary concern of the Drafters of the Statute of the ICJ was to maintain the greatest possible continuity between it and the PCIJ.¹⁶ The intention of the Drafters also extended to the continuity in case-law.¹⁷ In a sort of summing up, Judge Tanaka declared:

... there is no doubt that not only in their fundamental purpose but in every detail, namely from the viewpoint of organization, composition and procedure, the old and the new Court are identical with each other; the latter being the exact counterpart or copy of the former. They do not differ except in name.¹⁸

On the above premise, it is safe to proceed (as done in this work) on the footing that the history of the Statute of the PCIJ is substantially the same as that of the ICJ.

¹⁴ By article 37 of the Statute of the Court, whenever a treaty or Convention in force provides for reference of a matter to the PCIJ, the matter shall, as between the parties to the ICJ Statute, be referred to the ICJ.

¹⁵ Shabtai Rosenne, note 2, p., 65.

¹⁶ *Nicaragua v. USA* Jurisdiction and Admissibility, ICJ Rep 1984, 392, 407 para 32.

¹⁷ See the Dissenting Opinion of Judge Read in the *Interpretation of Peace Treaties between Bulgaria, Hungary and Romania, Second Phase*, ICJ Rep 1950, 65, 232-233.

¹⁸ Separate Opinion of Judge Tanaka in *Barcelona Traction Light and Power Company Ltd (Belgium v. Spain)* (Preliminary Objections), ICJ Rep., 6, 73.

2.5 The Value of Preparatory Work

As earlier stated, recourse to preparatory work is conducive when the meaning to be ascribed to terms used in an instrument cannot be ascertained on the plain text of that instrument. Though preparatory work may help illuminate the grey areas and make the real meaning of a provision more pronounced, it calls for caution when dealing with the preparatory work of a multilateral instrument in which preparation were involved a great many nations and several committees. This is so even with instruments adopted by a vote. How, for instance, can one tell even from the most profound study of the preparatory work of an instrument, that all the nations that voted for particular provisions were driven by a similar object? How could it be ascertained from the preparatory work that they all had the same understanding when voting for the provisions? These are perhaps why Judge Jessup counselled that:

one cannot understand or analyse the proceedings of a great international conference like those at Paris or San Francisco if one regards it as essentially the same as a meeting between John Doe and Richard Roe for the purpose of signing a contract for the sale of bricks.¹⁹

The foregoing explains the desire of the present writer to proceed knowing that due to a multiplicity of factors: language; the age of the instrument; the influx of new members²⁰ (the list is not exhaustive),²¹ there is always the danger of misrepresenting the intention of the drafters of an instrument (particularly multilateral instruments), when examining its preparatory work. Of the numerous factors affecting the value of preparatory work, the writer shall discuss only two – language and lapse of time.

¹⁹ Dissenting, *South West Africa cases*, (2nd Phase), ICJ Rep 1966, 6, 353-354; *Separate Opinion of Judge De Visscher, International Status of South West Africa* CIJ Rep 1950, 128, 189. (Reminding us that individualistic concepts are generally inadequate in the interpretation of a constitutional instrument like the UN Charter.) Also see the view of Judge Cordova in the *Application of the Convention of 1902 Governing the Guardianship of Infants*, ICJ Rep. 1958, 55, 143. (Stating that the common interpretation of the two contending states cannot be conclusive in the interpretation of a multilateral convention)

²⁰ *Separate Opinion of Judge Percy Spender in Certain Expenses*, note 7, p. 184-185 (Reasoning that unlike in treaties where the parties are fixed and constant, the original intention of the framers of a multilateral instrument like the UN Charter may become diluted by the influx of new members)

²¹ For example, Judge Alvarez identified three other factors that may affect the value of preparatory work: (a) the possibility of States or Committees abandoning a view they had put forward; (b) States signing a treaty are not influenced by the preparatory work with which they may even be unacquainted; (c) the increasing dynamism of international life – *Dissenting in the Competence of the General Assembly*, note 5, p., 18

2.5.1 Language

Multilateral instruments are products of series of compromises, which must be captured in a language that satisfies or, at least, pacifies all the parties. When, as is always the case, all the parties do not speak the same language, words can only convey the compromises as far as translations can go.²² This is even more so when an instrument such as the Statute of the Court was drafted and deliberated upon in a particular language (French) and then translated into other languages (such as English). This creates a tendency for the translated version to lose the essence of the words actually used in the original language. A common example is the different meanings French Courts and English Courts would ascribe to the word “jurisprudence” when construing the text of the same instrument.

Courts, both municipal and international, confront this problem when faced with a translated term in a treaty or different language versions of the same treaty. In the *Dispute Regarding Navigational and Related Rights*,²³ the ICJ was requested to construe the Spanish term “*con objetos de comercio*” in article VI of the 1858 Treaty of Limits (drafted in Spanish). The correct English interpretation of this term was the crux of the case. Nicaragua argued that the English translation was as, “with articles of trade”. For Costa Rica, the English translation was, “for the purposes of commerce”. To resolve the issue, the Court declared that the term must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meanings.²⁴

The crucial thing was that each of the meaning contended for impacted on the scope of the Treaty. The interpretation adopted by Nicaragua would limit the scope of the treaty only to

²² The writer is not oblivious of the provisions of article 34 of the Vienna Convention on the Law of Treaties, which presumes the terms of a treaty to have the same meanings in each authentic text when the treaty is in different authentic languages. This provision does not resolve the problem in practice; it leaves more questions than answers. How can “the same meaning” be achieved when the authentic texts all disagree on the meaning of the term? It is thus for the Court to decide on the meaning that best suits the object and purpose of the text. The writer also bears in mind that, by article 111 of the Charter of the United Nations English and French are authentic texts of the Charter, and by extension, the Statute of the Court which is an integral part of the Charter.

²³ (*Costa Rica v. Nicaragua*) ICJ Rep 2009, 213

²⁴ *Ibid*, p. 241 para 60; p. 244 paras 70, and 71

the transport of goods intended to be sold in a commercial exchange. In Costa Rica's interpretation, the treaty would have the broadest possible scope encompassing not only the transport of goods but also the transport of passengers, including tourists.²⁵ On its part, the Court held that, on a progressive interpretation of the article, the treaty covered all activities carried out for a price on the river. This included the transport of persons (including tourists) and of goods. How far any of these interpretations truly reflected the intention of the parties was a matter for speculation.

Directly on the point is the *LaGrand* case.²⁶ Here, the court was called upon to determine the binding nature of provisional measures made under article 41 of its Statute. The Court had to construe both the English and French versions of article 41. The United States had argued that "the use in the English version of "indicate" instead of "order", of "ought" instead of "must" or "shall", and of "suggested" instead of "ordered", is to be understood as implying that decisions under Article 41 lack mandatory effect".²⁷ The Court acknowledged that the two texts (which are the authentic texts of the provisions by virtue of article 111 of the Charter of the UN) were not in total harmony. It was the further view of the Court that it might be argued, having regard to the fact that, in 1920, the French text was the original version, that such terms as "indicate" and "ought" have a meaning equivalent to "order" and "must" or "shall".²⁸ The Court relied on the French version to hold that provisional orders were binding under article 41.²⁹

A slightly different situation presented before the United States Supreme Court in the cases of *Foster v. Neilson*,³⁰ and *United States v. Percheman*.³¹ These cases involved the same Treaty

²⁵ *Ibid*, p. 235-236, para 43-44

²⁶ (Germany v. United States), ICJ Rep 2001, 466

²⁷ *Ibid*, p. 502, para 100

²⁸ *Ibid*

²⁹ *Ibid*, p. 506, para 109; Rosenne thought it was regrettable that the Court did not explain why it relied on the French text. He argued that the English was the authentic text of the judgment given that the proceedings were conducted in English – Shabtai Rosenne, *Provisional Measures in International Law*, 37 (Oxford University Press, 2005)

³⁰ 27 U.S (2 Pet) 253, 314 (1829)

written in the different languages of the parties (Spanish and English). The case was presided over by the same Judge (Marshall, C.J), yet the Court ascribed different intentions to the framers. In the former, the Court held that the English version of the treaty which used the term "shall be ratified and confirmed" was not self-executing in the United States. Applying the Spanish version of the treaty four years later, the Court found the version which interpreted as the grants shall remain "ratified and confirmed to the persons in possession of them", to be self-executing. In rationalising the conflict, the Court explained that the Spanish part of the treaty was not brought into view in *foster v Neilson* and that it was then supposed there was no variance between them. Furthermore, the Court stated:

We did not suppose, that there was even a formal difference of expression in the same instrument, drawn up in the language of each party. Had this circumstance been known ... it would have produced the construction which we now give to the article³²

What is being said equally applies to an academic researcher. Just as with the cases mentioned above, a researcher can understand the intention of the drafters of a particular instrument only to the extent that her language of study (where the instrument is in different languages) expresses that intention. It is thus possible for Researchers of the preparatory work of an instrument in their different languages of study to disagree on the intention of the drafters of the instrument. Though each of them may ascribe a different (if not opposite) intention to the same provision, they may yet be right in the light of the meanings their respective language conveys.

³¹ 32 U.S (7 Pet) 51, 52, (1833)

³² *Ibid*, p. 89

2.5.2 Age-Long Continuing Duration

It may be possible with some treaties to unambiguously capture the exact meaning ascribed to a term as at the time the treaty was made. This seeming clarity of meaning may become eroded in the evolution of the meaning of the term, when all circumstances relating to the length of time that had elapsed since the treaty was made and the changes that had occurred within the entire legal landscape, in general, and within the particular area regulated by the treaty, are considered. This is particularly true in relation to instruments which have continuously existed for a long duration of time, without revision or amendment to its provisions. Though these factors are extrinsic to the term being construed, they bear heavily on the value a court would ascribe to preparatory work.

The ICJ had variously held that the meaning ascribed to a term in preparatory work, may yet not control if the passage of time and the evolution of the words render the original meaning so absurd that it would impede the effective application of the instrument when interpreted in the light of the meaning of the term as at when the treaty was made. This is, perhaps, why the ICJ does not consider its reasoning to be hampered by the circumstances that prevailed at the time a treaty was made, when with the passage of time, the term being construed no longer falls into the right context. As the Court noted about article 22 of the Covenant of the League of Nations:

Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant—"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned—were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied

within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned.³³

Also, reasoning in this direction, and with particular reference to article 38(1) of the Statute,

Judge Padilla Nervo stated:

[t]he world of today is far removed and different from the one of the First World War. New interests, new needs and new laws, customs, norms, and standards of international behaviour are being created by the relentless forces of public opinion, in search of recognition by the legislative and judicial bodies all over the world; and are today proclaimed or enacted by peaceful and normal procedures, or put into force by the sheer strength of peoples and States. The statesmen, the jurists, legislators, and the courts of justice, they all have to recognize the realities of today, for the sake of freedom, justice and peace. The Court is well aware of such realities and shall consider, in its interpretation of the relevant international instruments and obligations, the prevailing ideas and circumstances of today ... as well as regarding the actual meaning and universal recognition embodied now in the concepts "material and moral well-being and social progress", which is a dynamic concept. The Court, in my opinion, is not limited by the strict enumeration of Article 38, whose prescriptions it is free to interpret in accordance with the constant evolution of the concepts of justice, principles of law and teachings of publicists.³⁴

It has also been observed that the Court cannot ignore the prevailing moral and legal conscience of the world, and the acts, decisions and attitudes of the organized international community, which have created principles, from which may have evolved rules – such as a *jus cogens* rule – which were not so developed, or did not have such strong claims to recognition, as at the time a treaty was made³⁵ and which now impacts on the meaning of terms used in the treaty.

³³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, Advisory Opinion, ICJ Rep 1971, 16, 31 para 53

³⁴ *Dissenting, South West Africa cases*, note 19, p., 463-464

³⁵ *Ibid*, p.,467. This view was also echoed in the Separate Opinion of Fouad Ammon in the *Barcelona Traction Light and Power Company Ltd (Belgium v. Spain) (Second Phase)*, ICJ Rep 1970, 3, 287-288 (holding that “the radical transformations which have occurred ... in the last half-century, the constantly increasing expansion which has marked the recent decades ... and the new problems which these changes have given rise, call for a corresponding development of juridical structures. The law, a rigid conservative kind of law, cannot adapt the emerging reality to sacrosanct rules rooted in the remote past...”.)

True to this approach, the Court does not allow the meaning ascribed to a term by the drafters to override the meaning the term has taken on in its evolution as an instrument perpetuates. In the *Aegean Sea case*,³⁶ the Court held that the meaning of generic terms when used in a treaty, are intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. Accordingly, the Court held that the term "territorial status" used in the reservation of Greece to the 1928 General Act for the Pacific Settlement of International Disputes was liable to evolve in accordance with the development of international relations.³⁷

The above factors are some of the many dangers of interpreting a treaty primarily on preparatory works. For its best value, preparatory work confirms one of several conclusions, the ordinary meaning of an ambiguous term suggests.

2.6 The Preparatory Work of the Statute of the ICJ

With reference to the preparatory work of the Statute of the Court, the present writer shall proceed with some degree of circumspection, considering the length of time the Statute has survived. All other facts mentioned above, considered, the fact that the provisions have lived through almost a century (an eventful century that changed the shape and complexion of international law and the international community under which the provisions were formulated), cannot but affect the construction of the provisions.³⁸ A major change, which of

³⁶ (*Greece v. Turkey*) ICJ Rep 1978, 3, 32, para 77

³⁷ *Ibid.*, p. 33, para 78

³⁸ Reasoning with a similar conviction, Judge Alvarez, dissenting, *Status of South-West Africa*, note 19, p 175-177, wrote of the "great transformations" in the life of nations brought about by the two wars, and which transformation had organised the hitherto anarchical community of States. The Judge further opined that the transformation has influenced international law for three reasons – (a) it led to the emergence of new questions of international law; (b) it rests on the basic reconstruction of fundamental principles of classical international law and brings them into harmony with the new conditions of peoples; (c) it is based on the new social regime of interdependence which is taking the place of individualistic regime, which hitherto provided the basis of both national and international life. The Judge was convinced that the law must yield to these changing necessities in order to achieve its purposes. The writer does not ignore the humble beginning of the Statute of the Court and the circumstances under which it was negotiated; the world had just emerged from an unforgettable world war at a period where there was no real foundation for the entrenchment, albeit in principle, of sovereign equality. Nations were great or small according to their military prowess. This was even reflected during deliberations in the various Committees which discussed the Statute as constant references were made to "Great Powers". It was also reflected with regards to compulsory

course, impacts significantly on this study, is the new conception of sovereignty³⁹ which has given rise to the willingness of States to submit to international judicial settlement in an ordered society than it was in the era in which article 38(1) came into being. This has naturally led to the amassment of a formidable body of case-law, which no judge or jurists can safely ignore in the search for rules of international law. A body of law that is not merely searched as a repository of the law, but as a body of law from which new rules/principles have emerged and by which obscure rules have been crystallised.

The writer recognises the need to approach preparatory work with some degree of circumspection, given that the true intent behind the words of a treaty may be lost, not only in the flurry of compromises, but also in the insufficiency of translation, where the treaty is in different languages (like the Statute of the ICJ). The writer also recognises the problem arising from the continuous evolution of words or subject matter of an instrument. The writer is, nonetheless, equally compelled to remark that the history of the Statute of the Court should yield greater value and bring much more certainty than the history of treaties that serve the national interests of its framers as against the interest of the international community as a whole which the ICJ serves. The denationalised deliberations of the Jurists show that the members were not holding brief for their respective governments; neither were they driven by their respective national interests. They were passionate; their passion was to defeat the odds that plagued the 1907 attempt to create a permanent court of international

jurisdiction, with the small powers lacking in guns and economic powers, preferring an international Court with automatic compulsory jurisdiction where they could be victorious over the 'great powers' without firing a shot. See Lorna Lloyd, "A Springboard for the Future?: A Historical Examination of Britain's Role in Shaping the Optional Clause of the Permanent Court of International Justice," 79 *Am. J. Int'l L.*, 28, 40, (1985). Accordingly, the fear which marred the 1907 attempt to create a permanent independent court with jurisdiction to hold a great power accountable at the suit of a small power was still a factor of considerable importance. The great powers were more comfortable with arbitration over which they could exert much more influence than a court with permanence both in the tenure of judges and its existence. These were bound to fractionise legislative intent. See James Brown Scott, "The Codification of International Law", 18 *AM.J. Int'l L.*, 260, 271 (1924) (affirming that the great powers which had the power of the sword were "willing to renounce it in favour of judicial settlement only if assured in advance that the rules of law to be applied are satisfactory if not a better method to secure their interests").

³⁹ The creation of law through the activities of non-state actors is generally regarded as the most patent example of the new order. See Oren Perez, "Purity Lost: The Paradoxical Face of the New Transnational Legal Body", 33(1) *Brook. J. Int'l L.*, 7 (2007)

justice;⁴⁰ they were passionate about passing unto future generations an international justice system of which the ICJ (through the PCIJ) is the enduring legacy of the worthy endeavours of the best legal minds of that time. As a result, their deliberations and language were well guided and their disagreements were propelled by, and resolved on the basis of sound legal opinions. These qualities cannot but add some worth to the preparatory work of the Statute.

Added to this is the fact that even if the meaning ascribed to terms in preparatory work of a treaty can be ignored, the overall purpose intended to be served by the treaty cannot be ignored in seeking to understand the treaty. In *Certain Expenses of the United Nations*,⁴¹ Judge Spender remarked that the meaning of the text will be illuminated by the purposes it was set out to achieve. In seeking to understand article 38(1) through the preparatory work, therefore, the writer shall endeavour to understand, not only the difficult language of the provisions, but also their overall purpose. The writer shall seek to understand whether the underlying purpose of the provisions was to give the Court a complete statement of sources of international law with a view to adequately equipping it with tools needed for confronting absence or vagueness of rules of international law and preventing *non liquet*; or whether the purpose was to restrict the Court to the application only of positive law and resort to *non liquet* in any case that positive rules are lacking, notwithstanding that it was perfectly possible to avoid *non liquet* by recourse to rules emerging from non positive law sources.

⁴⁰ The attempt to set up a Permanent Court at the Second Hague Conference in 1907, failed because no agreement could be reached “respecting the selection of the judges and the constitution of the court”. This information was obtained from the website of the ICJ at <http://www.icj-icj.org/court/index>. (Accessed 23/09/2011).

⁴¹ Note 7, p., 187

2.7. Historical Background

The history of article 38(1) of the Statute of the ICJ could be traced to the proceedings of the 1920 Advisory Committee of Jurists, though some background to the provisions could be garnered from the different Draft Schemes submitted to the Committee by States.⁴² The Advisory Committee of Jurists was the first in the line of Committees that drafted the Statute. The Committee was set up at the second meeting of the Council of the League of Nations held in London in the February of 1920, pursuant to article 14 of the Covenant of the League of Nations,⁴³ which provides:

The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice. The Court shall be competent to hear and determine any dispute of an international character which the parties thereto submit to it. The Court may also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly.

The Committee was made up of the following members: Mineichiro Adatci (Japan), Rafael Altamira (Spain), Clovis Bevilaqua (Brazil), Baron Descamps (Belgium), Francis Hagerup (Norway), Albert De Lapradelle (France), Arturo Ricci-Busatti (Italy), Dr. Loder (Netherlands), Lord Phillimore (England), Elihu Root (United States of America) and Raoul Fernande (Brazil), who replaced Clovis Bevilaqua.⁴⁴ The Belgian Jurist, Baron Descamps, who incidentally proposed what became article 38(1), was appointed President of the Committee.

The Committee was set up to consider the proposal for the establishment of the Permanent Court of International Justice and advise the Council on its recommendations. The

⁴² See article 2 of the Draft for the Establishment of the Permanent Court of International Justice provided for in Article 14 of the Covenant of the League of Nations. Plan of the Five Neutral Powers, Annex II to the Memorandum in Documents presented to the Committee Relating to the Existing Plans for the Establishment of a Permanent Court of International Justice (available in <http://www.icj.org/homepage/index.php>, last accessed 02/02/ 2012), p., 90

⁴³ Adopted in Versailles in 1919

⁴⁴ See preface to Process-Verbaux of the Proceedings of the Committee of Jurists June 16-July 24, 1920 (available in <http://www.icj.org/homepage/index.php> last accessed 02/02/2012)

Committee was charged, *inter alia*, with the question of the limits of competence of the proposed Court. It sat from June 16 to July 24, 1920, to extensively discuss the Statute of the Court and make recommendations to the League Council. The proceedings of the Committee were generally conducted in French; all the members of the Committee, with the exception of Root, spoke in French so that a major aspect of available records is translated into the English language.

The tone of the arguments concerning the role of the Court in rule formulation (which is the fulcrum of this discussion) was set in the opening speech of Leon Bourgeois, who was delegated by the League Council to open the meetings of the Advisory Committee. In the speech, he envisaged the creation of a Court with “a small number of judges sitting constantly and receiving a mandate the duration of which will enable the establishment of a real jurisprudence, who will administer justice”.⁴⁵ He conveyed the idea of a Court that will fine-tune incoherent rules and develop the law in the course of adjudicating on the conflicting claims and interests of States. In his words, States have towards one another,

uncertain modes of contact, the nature of which is badly defined, the laws of which are still at the mercy of endless differences of opinion, or of arbitrary chance, just as it was between the citizens of each country in the first ages of civilisation. The precise object of the League of Nations is just this new and more complete definition of the largest possible number of relations between states, in such a way as to give an always increasing competence to the supreme power of justice.⁴⁶

It was thus expected, from the outset, that the Court would be the instrument for achieving a “new and more complete definition of the largest possible number of relations between States”.⁴⁷

⁴⁵ *Ibid.*, Annex No. 2, p., 7

⁴⁶ *Ibid.*, p. 8

⁴⁷ *Ibid.*, p. 8

It was, perhaps, in the spirit of this expectation that Baron Descamps proposed what became article 38(1) of both the Statute of the PCIJ and the ICJ. Descamps' proposal, in its undiluted form, read:

The following rules are to be applied by the judge in the solution of international disputes; they will be considered by him in the under-mentioned order:

1. Conventional international law, whether general or special, being rules expressly adopted by states;
2. International customs, being practice between nations accepted by them as law;
3. The rules of international law as recognised by the legal conscience of civilised nations;
4. International jurisprudence as a means for the application and development of law.⁴⁸

The proposal was not agreeable to members of the committee in the above form.

2.7.1 Objections to the Proposal: Deliberations

The first major opposition to the proposal came from the American Jurists, Elihu Root. Root expressed concerns that Descamps was proposing to give to the Court, more powers (legislative powers) than the League Council and by extension, Nations, were willing to concede to it. Root observed that the authors of the Covenant could only agree on a court that will be competent to deal with questions arising from the interpretation of treaties and questions of international law generally. He cautioned the Committee on the importance of not exceeding that mandate.⁴⁹ He particularly opposed paragraphs (3) and (4) of the proposal on the ground that they constituted an enlargement of the jurisdiction of the Court. He argued that States, like America would not accept the Court if the "vague" rules in clauses 3 and 4 of the proposal were retained, particularly as they pertained to compulsory jurisdiction;

⁴⁸ *Ibid*, p. 306

⁴⁹ *Ibid* p., 293

explaining that it was still too soon to go as far as Descamps wished.⁵⁰ He insisted that the Court must limit itself to conventions and positive law.

The Netherlands Jurist, Dr. Loder, disagreed with Mr. Root. Loder was particularly uncomfortable with Root's insistence that the Court must apply only positive international law. Loder noted that there were rules which were not yet of the nature of positive law, but that it was precisely the Court's duty to develop the law, to "ripen" customs and principles universally recognised, and to crystallise them into positive rules – to establish international jurisprudence.⁵¹

The British Jurist, Lord Phillimore, partly agreed with Root. Lord Phillimore thought the Court should not have legislative powers, for "legislations in matters of international law could only be carried out by the universal agreement of all States".⁵² He recalled the proposal of the Five Neutral Powers, but he agreed only with the first part, which largely conformed to clauses 1 and 2 of Descamps' proposal.

In the Five Neutral Powers proposal, referred to by Lord Phillimore, it was proposed:

Whenever the point of law to be decided by the Court is provided for directly or indirectly by any Treaty in operation between the contesting parties, such Treaty shall form the basis of the judgement. In the absence of such treaty provisions the Court shall apply the recognised rules of international law, or, should no rules applicable to the case exist, shall enter judgement according to its own opinion of what the rule of international law on the subject should be.⁵³

⁵⁰ *Ibid*

⁵¹ *Ibid* p. 294

⁵² *Ibid* p. 295

⁵³ League Documents, note 42

The French Jurist, Albert De Lapradelle, thought it was desirable for the Court to administer justice and not deal with diplomacy. He also expressed opposition to the judge acting as a legislator; nonetheless, he opined that it would be too strict and even unjust to force the Court to consider only law. He thought the Court should be accorded some level of freedom to adopt and modify legal solutions according to the exigencies of justice and equity.⁵⁴ The Norwegian Jurists, Francis Hagerup called to mind what he identified as the basis for the project of the five powers, the joint plan of Northern Countries Commissions, as well as the Swedish plan, which stated: “there might be cases in which no rule of conventional or general law was applicable. A rule must be established to meet this eventuality, to avoid the possibility of the Court declaring itself incompetent (*non liquet*) through lack of applicable rules”.⁵⁵ He noted that article 7 of the Convention establishing the International Prize Court took this eventuality into account through a provision that, absent applicable rules, the Court must render judgment according to justice and equity.⁵⁶ Hagerup favoured the view that the Court must have the power to fill gaps in positive law.⁵⁷ He emphatically argued that if Mr. Root’s view that the Court should, absent positive rules, declare *non liquet*, was accepted, it might have important consequences for the Court; as it will greatly limit the Court’s competence and place it in an entirely different position from that of an ordinary Court, which would not declare *non liquet*.⁵⁸

Seeing the controversy generated by the proposal, Descamps sought to clarify the grey areas.⁵⁹ First, Descamps sought to isolate the areas of differences of opinions. He observed that there was agreement on the imperative of the application of conventional and customary law to disputes by the Court. On the other hand, he noted that the point of disagreement was

⁵⁴ Proceedings of the Advisory Committee of Jurists, note 44, p., 295-296

⁵⁵ *Ibid*, p. 296

⁵⁶ *Ibid*

⁵⁷ *Ibid*

⁵⁸ *Ibid*, pp. 307-308

⁵⁹ *Ibid*, Annex No. 1 Speech by Baron Descamps on the Rules of Law to be Applied, p. 322.

how, absent either custom or convention, the judge would be restricted to applying objective justice as a complement to other conditions calculated at preventing the judge from making arbitrary decisions. While agreeing that it was conceivable that States would desire to be bound only by the engagements they had entered into, he was convinced, however, that: “[i]t is absolutely impossible and supremely odious to say to the judge that, although in a given case a perfectly just solution is possible: ‘you must take a course amounting to refusal of justice’ merely because no definite convention or custom appeared”.⁶⁰ “What, therefore, is the difference between my ... opponent [Root] and myself?” Asked Descamps. The difference is that “he [Root] leaves the judge in a state of compulsory blindness forced to rely on subjective opinions only; I allow him to consider the cases that come before him with both eyes open. In the first place, I would allow him to make use of the concurrent teaches of the authors whose opinions have authorities”,⁶¹ He further argued that “not to allow the judge to make use of existing international jurisprudence as a means of defining the law of nations ...[is] to deprive him of one of his most valuable resources”.⁶²

In further response to the arguments of the Jurists, particularly those of Root and Phillimore, Descamps laboured to dispel the misconception that his proposal gave judges a new power – legislative power – not conceded by States. In doing this, he argued that the application of a disputed rule in practice is constant in international jurisdiction; and that “you will never see a judge failing to administer justice on the pretext of a lack of conventional or customary law”.⁶³ He buttressed his assertion by the 1902 *California Pious Arbitration*⁶⁴ in which the Permanent Court of Arbitration affirmed its power to seek and apply just principles in international litigation. In the arbitration, the Arbitrators acknowledged that the controversy,

⁶⁰ *Ibid*, p. 323

⁶¹ *Ibid*

⁶² *Ibid*, p. 322

⁶³ *Ibid* p., 310-311

⁶⁴ *The Pious Fund of California (United States of America v The United Mexican States)*, rendered October 14, 1902

being between States, shall have to be determined on the basis of treaties and principles of international law. They, nonetheless, upheld the application of the *res judicata* principle on the reasoning that the principle is not only applicable under municipal law, but also to international tribunals. The arbitrations affirmed that it was for stronger reasons applicable to the arbitration at hand.

2.7.2 Sources to be considered successively

While maintaining that the Court should not be restricted to the application of positive law, Descamps maintained that the sources he proposed must be examined successively: the Court must first examine the text of a convention and apply same, if any; failing conventional rule, the Court should apply custom. If no rule is found in either, rather than plead *non liquet*, the Court should resort to general principles of law and the work of publicists, but the judge “must be saved the temptation of applying the rules as he pleased”.⁶⁵ The decision must be in keeping with the dictates of the legal conscience of civilised peoples. He affirmed that:

far from giving too much liberty to the judges, his proposal would limit it ... it would impose on the judges a duty which would prevent them from relying too much on their subjective opinion; it would be incumbent on them to consider whether the dictates of their conscience were in agreement with the conception of justice of civilised nations.⁶⁶

⁶⁵ Proceedings of the Advisory Committee of Jurists, Note 44, p., 318

⁶⁶ *Ibid*, p 311

2.7.3 Amendments to Descamps' Proposal: Further Deliberations

Following Descamps' elucidation, opposition began to soften so much so that Root was willing to accept the proposal but with some amendments. Root thought the proposal could be amended to read:

The following rules are to be applied by the Court within the limits of its competence, as described above, for the settlement of international disputes; they will be considered in the under-mentioned order:

1. Conventional international law, whether general or special, being rules expressly adopted by the states which are parties to a dispute;
2. International custom, being recognised practice between nations accepted by them as law;
3. The general principles of law recognised by civilised nations;
4. The authority of judicial decisions and the opinions of writers as a means for the application and development of law.⁶⁷

Descamps agreed with the draft, except that the words "coinciding doctrines" be substituted for "opinions" in clause 4. Descamps then stated that judicial decisions and doctrines should be used as auxiliary and supplementary means only. This proposed amendment and observations were opposable only to the Italian Jurist, Ricci-Busatti. Ricci-Busatti expressed his agreement with the substance of the proposal, as it indicated exactly the various sources which the judge might use, but that his conscience objects to some of the sources and their order of presentation. He particularly argued that it would hardly be possible to find coinciding doctrines concerning points in relation to which no generally recognised rules existed. He denied that opinions of authors could be considered as a source of law to be applied by the Court.⁶⁸ Having so observed, he proposed an amendment. The amendment read:

⁶⁷ Amended Text by Mr. Root, Annex 3 to the Procès - Verbaux of the 13th Meeting in the Proceedings, *ibid.* p. 344

⁶⁸ *Ibid.*, p. 332

The rules to be applied by the Court for the settlement of any international dispute brought before it, arise from the following sources:

1. International conventions, either general or special as constituting rules expressly adopted by the states which are parties to the dispute;
2. International custom as evidence of common practice among said states, accepted by them as law;
3. General principles of law recognised by civilised nations;

The Court shall take into consideration the judicial decisions rendered by it in analogous cases, and the opinions of the best qualified writers of the various countries, as means for the application and development of law.⁶⁹

Reacting directly to the objections of Ricci-Busatti, Descamps stated that he was astonished to find that Ricci-Busatti did not accept doctrine as an element of interpretation. To Descamps, this element could only be of a subsidiary nature; the judge should only use it in a supplementary way to clarify the rules of international law. He thought doctrine and jurisprudence, no doubt, do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.⁷⁰

On his part, De Lapradelle thought jurisprudence was more important than doctrine, since judges pronounce sentences with a practical end in view. He noted that the principal question was the attitude a judge would take if in a certain case, jurisprudence failed, and there was no generally accepted principle applicable. He, therefore, called on the Committee to add a fifth point that would deal with that gap.⁷¹ Lapradelle thought Ricci-Busatti's proposal, that the Court should take, "into account as much as possible judicial decisions", was not sufficiently precise. Descamps expressed surprise that De Lapradelle did not see the value of clause 4, assuring him that the power of a judge to make use of the elements so mentioned is not a dangerous one as it would only be for elucidating and supplementary purposes. Having said

⁶⁹ *Ibid*, p. 351

⁷⁰ *Ibid*, p. 336

⁷¹ *Ibid*, p. 336

that, he pleaded with Lapradelle not to insist upon more radical alterations of the text, which he (Descamps) thought was satisfactory. Clause 4 was, however, reworded thus: “the authority of judicial decisions and the doctrines of the best qualified writers of the various Nations”.⁷² Also, the Committee accepted the suggestion of Lapradelle that the word “the rules of law to be applied” be included in the draft.

Having obtained compromises from members, the proposal was sent to the Drafting Committee. The Committee came out with the following draft:

The Court shall, within the limits of its jurisdiction, as defined in article 29, apply in the order following:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2. International custom, as evidence of a general practice, which is accepted by them as law;
3. The general principles of law recognised by civilised nations;
4. Rules of law derived from judicial decisions and the teachings of the most highly qualified publicists of the various nations.⁷³

When the draft came up for discussion, Descamps proposed an amendment to clause 4 inserting, “as subsidiary means for the determination of the rules of law”. Phillimore still had objections to the wording of the clause, arguing that judicial decisions state and do not create law. De Lapradelle wanted the entire clause 4 deleted as the source of law it contained could not be clearly defined. He argued that laws, customs, and general principles of law could not be applied without reference to jurisprudence and teachings.⁷⁴ He thus proposed:

[t]he general principles of law recognised by civilised nations as interpreted by judicial decisions and by the teachings of the most highly qualified publicists of the various countries.

⁷² *Ibid*, p. 337

⁷³ Article 31 of the Text Prepared by the Drafting Committee, *ibid*

⁷⁴ *Ibid*, p. 584

In the course of further deliberations, Lord Phillimore suggested that the expression, “the rules of law derived from”, be deleted.⁷⁵ As a compromise, Descamps proposed the following amendment:

The Court shall take into consideration judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.⁷⁶

Ricci-Busatti’s proposal to substitute “juridical interpretation” for “determination of the rules of law”, was rejected and the draft provision adopted without a consensus. De Lapradelle and Hagerup abstained from voting because their opinions were not shared by their Colleagues. Ricci-Busatti out rightly voted against the provision.⁷⁷

The final draft forwarded to the League Council read:

The Court shall, within the limits of its jurisdiction, as defined in article 29, apply in the order following:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2. International custom, as evidence of a general practice, which is accepted as law;
3. The general principles of law recognised by civilised nations;
4. Judicial decisions and teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.⁷⁸

⁷⁵ *Ibid*, p 620

⁷⁶ *Ibid*

⁷⁷ *Ibid*

⁷⁸ *Ibid*, p 730; also see Draft Scheme for the Establishment of the Permanent Court of International Justice, Mentioned in Article 14 of the Covenant of the League of Nations, presented to the Council of the League by the Advisory Committee of Jurists. Vol. 111 Doc. 16, p. 673 as annexed to League Documents, note 42, p. 19.

2.7.4 Amendments to the Final Draft Scheme of the Committee of Jurists by the League Council

Records show that, upon receipt of the Draft Scheme by the League Council, it considered that it should not regard itself as a second committee set above the first to oppose a legal knowledge which it did not possess.⁷⁹ Having so considered, the Council yet adopted, in relation to article 35 (later article 38), a supposedly innocuous amendment, which later proved difficult and far-reaching. The Council decided to insert the text, “subject to article 57a [now article 59]” in the then article 35 to read:

Within the limits of its competence, as determined by article 34, the Court shall apply in the following order:

1. International conventions, either general or special, establishing rules expressly recognised by the disputing states;
2. International custom, as evidence of a general practice, which is accepted as law;
3. The general principles of law recognised by civilised nations;
4. Subject to the provisions of article 57(*bis*), judicial decisions and the doctrine of the most qualified publicists, as an additional means of determining the rules of law.⁸⁰

The League Council also inserted an article 57(*bis*) which was not in the Draft Scheme submitted by the Committee of Jurists. The article states: “[t]he decision of the Court shall only be binding upon the parties in the dispute and in the case decided”.⁸¹ The Council reformulated paragraph (4) to read: “subject to the provisions of article 57a judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of the rules of law”.⁸² Thereafter, the League Council referred

⁷⁹The Report of Committee No. III on the Permanent Court of International Justice Presented by the President to the Twentieth Plenary Meeting of the First Assembly on December 13th 1920; see Documents, *Ibid*, p. 225-226

⁸⁰Amendments Proposed by the Council to Certain Articles of the Scheme for the Permanent Court of International Justice, *ibid*, p. 58, 68

⁸¹ *Ibid*

⁸² *Ibid*, p. 58

further deliberations on the provisions to the Third Committee of the Assembly. This Committee examined the Draft Scheme of the Committee of Jurists and in turn referred same to its Sub-Committee. The Sub-Committee was made up of ten members, five of which were members of the Advisory Committee of Jurists.⁸³

2.7.5 Further Deliberations: The Sub-Committee

The Sub-Committee, like the League Council, thought, article 38 as drafted by the Committee of Jurists should substantially be retained. It considered the words “within the limits of its jurisdiction as defined above”, and the words “in the order following”, to be unnecessary and deleted them from article 38. It inserted a new clause permitting the Court to, if necessary and with the consent of the parties, make an award *ex aequo et bono*. This, in the view of the Sub-Committee, was to give more flexible character to the provision.⁸⁴

2.7.6 The Final Draft

The final draft adopted by the Assembly of the League on December 13, 1920, was:

The Court shall apply:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2. International custom, as evidence of a general practice accepted as law;
3. General principles of law recognised by civilised nations;
4. Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

⁸³ See the Report of Committee No. III on the Permanent Court of International Justice presented to the First Assembly Twentieth Plenary Meeting, December 13th, 1920, see League Documents, *ibid*, p., 226.

⁸⁴ Documents, *ibid*, p. 219

This provision shall not prejudice the power of the court to decide a case *ex aequo et bono*, if the parties agree thereto.⁸⁵

2.8 From the PCIJ to the ICJ

To these provisions which are now article 38 of the Statute of the ICJ, no remarkable amendment was made in 1945, when the Statute of the ICJ was considered. The amendments effected were mainly structural (renumbering). The only substantive but negligible amendment that made was, “[t]he Court whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply....”, proposed by Chile at San Francisco.⁸⁶

The Report of the Informal Inter-Allied Committee captured the reason for retaining the provision without any major alteration. It was reported that:

The wording of this provision [article 38] is open to criticism and it would not be difficult to make suggestions for improving it; but on the whole the difficulties resulting from it ... do not seem to be of a sufficiently serious character to necessitate any change. It seems to have worked well in practice and we consider that any attempt to alter it would cause more difficulties than it would solve.⁸⁷

This position was not altered by the Washington Committee of Jurists.⁸⁸ Also, article 59 was retained without an amendment.

⁸⁵ League Documents, *ibid*, p. 264

⁸⁶ Alain Pellet “Article 38’ in the Statute of the International Court of Justice”, Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm ed., *The Statute of the International Court of justice: Commentary*, 677, 689-690 (Oxford University Press: Oxford, 2006).

⁸⁷ “Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice,” 10th February 1944 39 Am. J. Int’l L. Supp. 1, 1, 20 (1945)

⁸⁸ UNCIO, vol. XIV, p. 315, cited from Alain Pellet, note 86, pp 689-690 (Pellet affirmed this Committee rejected the view that judicial decision is not a source of law).

2.9 Original Intent

Further to the observations made at the beginning of this chapter, ascertaining the intention of the drafters of these provisions is bound to prove difficult considering the manner in which what became articles 38 and 59 were pieced together by different set of people and at different Committees.

Despite the apparent difficulty of understanding the intention behind the ultimate wording of paragraph (d), it is easy to gather from the trend of discussions during the deliberations of the different Committees that the intention of a majority of members was for the Court to have available to it all the means germane to the fulfilment of its purpose and maintaining its character as a court of justice. These were the means that will enable the Court fill gaps in positive law and avoid a fundamental inhibition of its judicial powers – *non liquet*. The actualisation of this eternal purpose is the whole essence of the exhaustiveness of the sources in article 38(1).

It is obvious from the Jurists' deliberations that they never doubted that judicial decisions could serve as a source of law to compensate for gaps in positive law. Hence at various stages of deliberations, the Jurists variously proposed the use of such words as, "international jurisprudence as a means for the application and development of law"; "rules of law derived from judicial decisions". One amendment even considered, decisions rendered in "analogous cases" as means for the application and development of law. Yet another proposal spoke of "the authority of judicial decisions".⁸⁹

At the risk of contradicting the flow of available literature, there is nothing in the deliberations of the Jurists to suggest that the wording of the provisions was intended to deny

⁸⁹ See pp 65, 70 and 72, above

judicial decision its Anglo-American character. What the Jurists – incidentally Root⁹⁰ and Phillimore, whom were trained in the common law tradition – were initially worried about was a situation where Judges would take advantage of the legislative deficiencies of the international system to apply rules that are dictated by their subjective notions of right and wrong and or from the notion of law prevailing in their individual States. This concern was mainly fuelled by the fact that, unlike in arbitrations, the great powers were not to be in control of the appointment of judges, and thus not in control of court processes. The Jurists were concerned about how to ensure that judges enunciated rules that are not incongruent to the legal conscience of civilised nations.

This point was clearly made by the British Jurist, Cecil Hurst, during the deliberations of the Sub-Committee of the Third Committee of the League Council. He informed the Committee that what was feared in England, given that the decisions of the Court would be regarded as precedents building up the law, was “that the decisions of the Court might establish rules of law incompatible”⁹¹ with one or either of the Anglo-Saxon or continental systems of law. Very early in the deliberations of the Jurists, Descamps spotted this fear; hence it was important for him to emphasise that he did not intend to give legislative powers to judges. While agreeing with Mr. Root that it would be dangerous to allow Judges to apply the law of right and wrong exclusively according to their own personal understanding of it,⁹² Descamps

⁹⁰ Despite their vehement objection to paragraph (d), the eminent Jurists understood the inevitability of judicial law-making by the Court, given that international law is largely not codified. Root had the conviction that “the hopes of the world rested upon the realisation of the rule of law. The creation of institutions with this object contains the germ of future development. Legal decisions based on previous decisions of the same kind, it is this way that progress is possible. The world would become accustomed to act according to law” – Proceedings of the Advisory Committee of Jurists, note 44, p. 230. On his part, Lord Phillimore considered the common law as “having the same character as any written law” – Proceedings of the Advisory Committee of Jurists, p., 316. Hagerup agreed with Phillimore, declaring that he “would be pleased to see the Judges of the Permanent Court judge according to the same principles as English Judges, and judges generally. They must give judgment according to rule of law but they must not declare that it is impossible for them to decide because of the absence of rules. There must be no possibility of a denial of justice.” – Proceedings of the Advisory Committee of Jurists. Even Loder had questioned: “did the Committee think it would be possible to create a court which might at any given moment refuse to pronounce judgment because no applicable [positive] rule existed?” Proceedings of the Advisory Committee of Jurists, p. 311

⁹¹ League Documents, note 42, p., 138

⁹² Proceedings of the Advisory Committee of Jurists, note 44, p., 318

stated that it was exactly for this reason that he was indicating the lines which the judge must follow and compel them to conform to the dictates of the legal conscience of civilised nations. Accordingly, he stated that when a certain solution is approved by universal public opinion, the judge is justified in applying it.⁹³ He affirmed that the power to administer justice must not be taken away from judges but that a formula defining and guiding this power can and must be discovered. He further explained that his proposal requires that:

...the various sources of law should be examined successively. The first rule was that if there were a text, a conventional rule, it must be applied. Failing a rule of this kind, international custom must be applied. If neither law nor custom existed ... the judge must then apply general principles of law. But he must be saved from the temptation of applying these principles as he pleased. For that reason ... the judge must render decisions in keeping with the dictates of the legal conscience of civilised peoples and for this same purpose make use of the doctrines of publicists carrying authority.⁹⁴

Barely three years after the Court gave its first ruling, did Cecil Hurst expressly adopt the predominant view of the Jurists on the question of the authority of judicial decisions. Advising the British government on the debate concerning the accession of the United States to the Statute of the PCIJ, he predicated his advice on the precedential force of the *Status of Eastern Carelia case*.⁹⁵ Cecil Hurst stated:

How far the rule embodied in this decision of the court extends is a question which at the present time it is impossible to answer. All that is possible to do ... is to refer to the Eastern Carelia case. The court will gradually build up a rule of law on this point... as no doubt such successive decisions will constitute precedents in the same way that the successive decisions of the English courts in earlier times have built up the common law of England. It would be unwise to attempt to fetter the power of the court to build up the rule in this way.⁹⁶

This clearly shows that the fears in England as expressed by Cecil Hurst at the drafting stage of the provisions had defused even before the case-law of the Court became the robust

⁹³ *Ibid*

⁹⁴ *Ibid*, p., 318-319

⁹⁵ Opinion of July 23, 1923; Series B No. 5

⁹⁶ The Permanent Court of International Justice, Question of Accession of the United States of America to the Protocol of Signature to the Statute of December 16, 1920, HMSO, Cmd. 2776 (1926), p. 8, para 26, cited in Mohamed Shahabuddeen, *Precedent in the World Court*, 13-14 (Cambridge University Press, 1996)

embodiment of rules/principles of international law as it is today. On the whole, the above analyses do show that the predominant opinion at the time of drafting the Statute held judicial decisions to be a source of law. They analyses also show that the Jurists well understood that it was idea to keep judicial and legislative powers separate, as much as they understood that attaining such an idea was not possible; more so, under international law, which has too many vague and indeterminate rules.

2.10 Some Contradictions in Descamps Views

In what appears a contradiction of the view that Descamps saw Judicial decisions as a source of law, Descamps had remarked, while addressing objections raised to paragraphs 3 and 4, that:

Doctrine and jurisprudence no doubt do not create law; but they assist in determining rules which exist. A judge should make use of both jurisprudence and doctrine, but they should serve only as elucidation.⁹⁷

It must however be admitted that Descamps did contradict himself in the views he expressed during Committee deliberations. Clearly, the above quotation appears to support the view that Descamps did not intend judicial decisions to be a source of international law.

No doubt, it was on the strength of this quotation that Godefridus J.H. Hoof⁹⁸ trenchantly argued that Descamps' original intention was to preclude the use of judicial precedent in the Court. Hoof had argued that the views expressed by Descamps "left no room for doubt as to his opinion on the role to be assigned to judicial decisions in the draft of the rules to be applied by the Court".⁹⁹ Hoof affirmed that:

the words "subsidiary means for the determination of rules of law", therefore, would seem to reflect the intention of the drafters of article 38

⁹⁷ Proceedings of the Advisory Committee of Jurists, note 44, p. 336

⁹⁸ Hoof, note 2, p. 169

⁹⁹ Hoof, *Ibid*, p.170

that judicial decisions cannot be accorded the status of source in the former sense of that term, that is in the same sense as treaties, customs and general principles were meant to be sources of international law.¹⁰⁰

However, Hoof's, and all other such views, seem to ignore the general context of the deliberations, during which the statement was made. In order to have a full grasp of Descamps' arguments, it is important that the quotation is not lifted out of the entire context of Descamps thoughts.

It is equally important to note that this was not Descamps' approach from the beginning. As could be seen above, his initial proposal did not reflect this view. All items listed in the first draft were rules to be applied by the Court successively. Otherwise, why did it generate so much argument from members of the Committee about the draft giving to the Court legislative powers? From the outset, the Jurists were all convinced that the inclusion of judicial decisions in the Statute, under any guise, whatsoever, would empower the Court to apply its decisions as a source of law. Even if it was not so intended, they knew it would eventually become a veritable embodiment of legal rules for the application of the Court. It was foretold by Mr Balfour in 1920 that "the decisions of the Permanent Court cannot but have the effect of gradually moulding and modifying international law".¹⁰¹ This is a prophecy that the Court has been fulfilling. Indeed, as shown in subsequent chapters, the fact that Descamps was goaded by the arguments of some of the Jurists to neutralize the text relating to judicial decisions through the term, "as subsidiary means for the determination of the rule of law", (as an assurance that judicial decisions "state" and do not "create" law),¹⁰² has not affected authority of judicial decisions as a source of international law. It does not also derogate from the fact that lawmaking and law application go hand in hand.

¹⁰⁰ Hoof, *Ibid*

¹⁰¹ League Documents, note 42, p. 46

¹⁰² Proceedings of the Advisory Committee of Jurists, note 44, p. 620

As argued in chapter three, the term “subsidiary” (and its synonym, “auxiliary”,¹⁰³ originally used by Descamps) was intended towards making paragraph (d) additional or supplementary provisions to the items mentioned in article 38(1)(a-c). Hence his initial draft proposed the application of the sources, including judicial decisions, “in the order following”. As a result, he maintained throughout the deliberations, that the sources should be considered in the order of presentation. The rationale was that the Court is permitted to resort to judicial decisions as a last resort and only as subsidiary to treaties and customs. It is worth noting, also, that Descamps included the term “subsidiary means” at an advanced stage of deliberations on the draft article, perhaps, as a compromise to the argument of Ricci-Busatti that it was wrong to place conventions and customs on the same level with doctrine and judicial decisions.

It must not be forgotten that Descamps was the President of the Committee upon whose shoulders the responsibility to steer the Committee to success rested. The weight of this duty and the thought of the failure of the 1907 Conference on Pacific Settlement of International Dispute must have weighed heavily on his mind and influenced his flexibility. It is convenient to assume that he knew that failure to reach a compromise on the law to be applied by the proposed Court would once again mar the hope for the creation of a permanent international court. He must have understood that their efforts would be futile if the Court is encumbered by *non liquet*. Having been exasperated by the difficulty of the Committee to reach an agreement after several amendments had been proposed, it is on record that he even had to plead with his Colleagues not to demand a radical alteration of the proposal when they still failed to reach a consensus after he had conceded to repeated alterations. This may well account for his conflicting remarks on the subject. How can we reconcile the view that doctrines and jurisprudence can only serve the purpose of elucidation with his subsequent

¹⁰³ Descamps had used the words “...auxiliary and supplementary ...” Proceedings of the Advisory Committee of Jurists, *ibid*, p., 332 and 334

view that the Court must, for the purpose of avoiding *non liquet*, make use of the doctrines of publicists carrying authority? If doctrine could be used for that purpose what about judicial decisions?

It could, therefore, rightly be concluded that the circumstances in which that clause was adopted by the Jurists and the arguments that preceded it sufficiently explain the apparent discrepancies in the arguments of Descamps, as much as they explain the use of the word “subsidiary means for the determination of rules of law”.

2.11 Intention to be Commonly Shared Across Committees

Even if it was true that Descamps and indeed the Advisory Committee of Jurists intended that judicial decisions should not be regarded as a source of international law, that intention would have to be commonly shared by the Committees that reviewed the Draft Scheme submitted by the Jurists for that intention to govern. It should be recalled that the Jurists only had an advisory and not a confirmatory mandate. It discussed the proposed Statute and passed its recommendations to a higher body – the League Council –which referred the Scheme to the Third Committee of the Assembly, which in turn referred it to its Sub-Committee for further scrutiny. Under these circumstances, the effect of the intention of the Jurists becomes attenuated regarding any provision, such as article 38, which was further amended by those subsequent Committees. The prevailing intention, if known, should be the intention of the last Committee in the chain of Committees that considered the proposal, and that is the Third Committee through its Sub-Committee.

It is on record that the Third Committee unmistakably accepted the view that judicial decisions should be retained in article 38(1)(d) as a source of international law. This is

obvious from the reasons given by its Sub-Committee for rejecting an amendment proposed by Argentina. The proposal was that:

The Court shall, within the limits of its jurisdiction as defined in article 34, apply in the order following:

1. International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
2. The rules drawn up by the Assembly of the League of Nations in the performance of its duty of codifying international law.
3. International custom, as evidence of a practice founded on principles of justice and humanity, and accepted as law;
4. The general principles of law recognised by civilised nations;
5. Judicial decisions, as against the state in which they have been delivered, if it is a party to the dispute; and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules and law.¹⁰⁴

Rejecting the proposal, the Sub-Committee gave two reasons: (i) the Committee thought “it [the amendment] tended to give the Assembly of the League the power to codify international law”, affirming that “the stage of development where this would be possible had not been reached”; (ii) the Sub-Committee thought it would “have the effect of excluding every possibility of considering the judgments as precedents building up the law”.¹⁰⁵ Also commenting on the issue, the Chairman of the Sub-Committee and member of the Committee of Jurists, Hagerup, stated that being that the Argentine proposal intended to limit the power of the Court to attribute the character of precedents to judicial decisions, the Sub-Committee did not adopt it because, it considered that it would be one of the Court’s important tasks to contribute, through its jurisprudence, to the development of international law.¹⁰⁶

¹⁰⁴ Amendments proposed by the Argentine Delegation to the Draft Scheme of the Advisory Committee of Jurists for the Institution of a Permanent Court of International Justice, as modified by the Council of the League of Nations. League Documents, note 42, p. 65

¹⁰⁵ Report presented to the Third Committee by M. Hagerup on behalf of the Sub-Committee, *ibid*, pp. 145, 211.

¹⁰⁶ *Ibid*

It is worth mentioning that the Draft Schemes presented by some States expressly empowered the Court, in the absence of positive law, to apply what the Court considered to be international law on the point in controversy.¹⁰⁷ It is also of particular interest here that clause 4 of the Argentine draft, as rejected by the sub-committee, reflects what appears to be the dominant view in the literature regarding article 38(1)(d) and article 59. Having rejected that view, it remains to be seen how article 59 can be used to reinvent the view. To buttress this point, the writer shall now consider the effect of a rejected proposal during the drafting of an instrument.

2.12 The Effect of a Rejected Proposal at the Drafting Stage of a Treaty

What is the effect of the refusal of a proposal at the preparatory stage of a convention? The rejection of a proposal during the preparation of a convention puts an end to the rule such a proposal sought to introduce, whenever the wording of the convention falls to be construed. This effect could be garnered from the reasoning of the Court in the *Locus case*.¹⁰⁸ In the case, the Court was called upon to determine whether Turkey had rightly exercised jurisdiction over French citizens in respect of an accident that occurred on the high sea. This followed the collision between *S.S. Lotus*, flying the French flag and *S.S. Boz-Kourt*, flying the Turkish flag, on which eight Turkish nationals were killed. The Court had to construe article 15 of the Convention of Lausanne Respecting Conditions of Residence and Business and Jurisdiction, which provided that “all questions of jurisdiction between Turkey and the other contracting powers, be decided in accordance with the principles of international law”. France argued that the Drafters’ preference for the term “principles of international law” was to make the exercise of jurisdiction under the article to be in conformity with the principles of

¹⁰⁷ Article 27 of the Joint Draft Scheme of Norway, Denmark and Sweden Council Documents at 179; article 2 of the Plan proposed by the Five Neutral Powers – Norway, Denmark, Sweden, Switzerland and Netherlands), *ibid*, p. 301.

¹⁰⁸ Note 3

international law. France further argued that for Turkey to have jurisdiction, it must point to some title to jurisdiction recognised by international law in her favour. France based her argument on the fact that during the preparation of the Convention, a proposed draft introduced by Turkey, in which she sought to extend her jurisdiction to crimes committed in the territory of a third State, if the crimes were punishable within the jurisdiction of Turkey, was opposed and consequently rejected by the Drafting Committee.

Holding that the words must be interpreted to mean international law as applicable between all Nations belonging to the community of States,¹⁰⁹ the Court categorically stressed the fact that the Turkish draft was discarded by the Committee. According to the Court:

The two opposing proposals designed to determine definitely the area of application of Turkish criminal law having thus been discarded, the wording ultimately adopted by common consent for article 15 can only refer to the principles of general international law relating to jurisdiction.¹¹⁰

The Court concluded that its view that the provisions must be read to mean international law as applicable between all nations cannot be faulted, and that the records of the preparation of the Convention furnished nothing calculated to overrule the construction indicated by the actual terms of the provisions.¹¹¹

It is thus out of place to construe article 38(1) to coincide with a view, reflecting a proposal that was rejected by the Drafters of the provision. If anything, it should rightly be concluded from the view expressed by the Third Committee that it considered judicial decisions to be a source of international law.

¹⁰⁹ *Ibid*, p. 16

¹¹⁰ *Ibid*, p.17; also see the *Rights of Nationals of the United States of America in Morocco (France v. United States)*, ICJ Rep 1952, 176, 210, where the Court held that the rejection of the German proposal, seeking to introduce the value in country origin test to the Custom regime covered by the 1906 Act of Algeciras, was conclusive of the rejection of the test, so that the Act could not be construed in consonance with the said rejected proposal

¹¹¹ *The Lotus, ibid*, p. 17

2.1.3 *Non Lique* in the Preparatory Work of the Statute

A further evidence to show that the Committee proceeded with the understanding that judicial decisions will play a law-creating role, though not in doubt that law-creation and law-application were to be kept separate, are the views expressed concerning the question of *non lique*. It is clear from the deliberations of the eminent Jurists that the Court should fill gaps in positive law through the windows created in article 38(1)(c) and (d) of its Statute.

During deliberations, the American Delegate, Root had indicated his disagreement with the rules now contained in paragraphs (c) and (d) of article 38(1). He thought they were vague and would enlarge the jurisdiction of the Court to an extent unacceptable to States. He would rather the Court was limited to conventions and positive international law.¹¹² Root found companionship in the British delegate, Lord Phillimore. In support of Root's argument, Lord Phillimore drew the attention of the Committee to the Plan of the Five Powers. The Plan proposed that:

Whenever the point of law to be decided by the Court is provided for directly or indirectly by any Treaty in operation between the contesting parties, such Treaty shall form the basis of the judgment. In the absence of such treaty provisions the Court shall apply the recognised rules of international law, or, should no rules applicable to the case exist, shall enter judgement according to its own opinion of what the rule of international law on the subject should be.¹¹³

Lord Phillimore rejected, in its entirety, the part of the Five Power Plans that gave the Court power to fill gaps in international law. He argued that this gave the Court legislative power,

¹¹² Proceedings of the Advisory Committee of Jurists, note 44, p. 293-294.

¹¹³ See Plan of the Five Neutral Powers, Annex II to the Memorandum in Documents presented to the Committee relating to the Existing Plans for the Establishment of a Permanent Court of International Justice, note 42, p. 90

when legislation in matters of international law could only be carried out by the universal agreement of all States.¹¹⁴

Root and Philimore's views were opposed by a majority of members of the Committee, who argued in favour of the power of the Court to fill gaps in positive law. In this light, Loder questioned the formula proposed by Root that the Court should limit itself to rules contained in conventions and rules of positive law. Loder described the rule in paragraph (c) as rules recognised and respected by the whole world, which are not yet of the nature of positive law. He affirmed that it was the Court's duty to develop law, to "ripen" customs and principles universally recognised and to crystallise them into positive rules.¹¹⁵ On his part, Descamps agreed that it was conceivable that States would love to be bound only by the engagements they had accepted. Nonetheless, he argued that: "[i]t is absolutely impossible and supremely odious to say to the judge that, although in a given case a perfectly just solution is possible: 'you must take a course amounting to refusal of justice' merely because no definite convention or custom appeared".¹¹⁶ Descamps would allow the judge to make use of the concurrent teachings of authors whose opinions have authority; he will also allow the Court to rely on the legal conscience of civilised nations.¹¹⁷ He remarked that "you will never see a judge failing to administer justice on the pretext of a lack of conventional or customary law".¹¹⁸ Furthermore, he affirmed that if, after considering treaties and customs, no rule is found in either, rather than plead *non liquet*, the Court should resort to general principles of law and the work of publicists.¹¹⁹ The Norwegian Jurists, Francis Hagerup, reminded his Colleagues that the basis of the provision in the Five Powers Plan was the realisation by the

Powers that:

¹¹⁴ Proceedings of the Advisory Committee of Jurists, note 44, p. 295

¹¹⁵ *Ibid*, p. 294

¹¹⁶ *Ibid*, p.322-323

¹¹⁷ *Ibid*, p. 323

¹¹⁸ *Ibid*, p. 310-311

¹¹⁹ *Ibid*, p 318

there might be cases in which no rule of conventional or general law was applicable. A rule must be established to meet this eventuality, to avoid the possibility of the Court declaring itself incompetent (*non liquet*) through lack of applicable rules.¹²⁰

He noted that article 7 of the Convention establishing the International Prize Court took this eventuality into account by the provision that in such a case the Court must render judgments according to justice and equity.¹²¹ Hagerup favoured the view that the Court must have the power to fill gaps in positive law.¹²² He insisted that “it must be impossible for the Court to abstain from giving a decision, alleging that no positive applicable rule exists”.¹²³ Hegerup called Mr. Root’s sustained argument to mind. He thought that if Mr. Root’s view that the Court should declare *non liquet* in the absence of rules of positive law was accepted, it might have important consequences for the Court. This he thought, will limit appreciably, the Court’s competence and place it in an entirely different position from that of an ordinary court, which would not declare *non liquet*.¹²⁴ Hagerup stated that inasmuch as he would be pleased for it to be compulsory for judges of the PCIJ to decide according to rules of law, the judges must not declare that it is impossible for them to decide because of the absence of rules, as there must be no possibility of denial of justice.¹²⁵ In categorical terms, Hagerup recommended the adoption of the English principle of judge-made law by empowering the judge to seek precedents and analogies as an alternative to refusing a claim.¹²⁶

De Lapradelle supported the view. He noted that the Court must have the power to apply principles to fill gaps in positive law.¹²⁷ He agreed that it was necessary to assure States that the Court would concern itself with application of law, to administer justice and not succumb to a temptation to deal with diplomacy. He was, nonetheless, categorical in pointing out that

¹²⁰ *Ibid*, p. 296

¹²¹ *Ibid*

¹²² *Ibid*

¹²³ *Ibid*

¹²⁴ *Ibid*, p. 307-308

¹²⁵ *Ibid*, p. 318

¹²⁶ *Ibid*, p. 318

¹²⁷ *Ibid*

it would be too strict and even unjust to force the Court to consider only law. He thought there would be no danger in allowing the Court to consider whether any particular legal solution was just and equitable, and if necessary, to modify the legal solution according to the exigencies of justice and equity. He specifically argued that confidence must be put in the judges, who should be allowed to consider these different elements for themselves.¹²⁸

The arguments in favour of the Court filling gaps in positive law, as against the declaration of *non liquet*, found acceptance with the majority of members of the Committee. This is evidenced by the retention of paragraphs (c) and (d) which were the main targets of those in favour of *non liquet*. There can be no better proof of the fact that article 38(1)(c) and (d) were accepted in the Statute of the Court as a sign of the absolute rejection of *non liquet*.

It is interesting to note here that the arguments in favour of *non liquet* (the antithesis of the power of the Court to make international law) were championed by Committee members from the United States and the United Kingdom, where the common law prevails. This is in contrast with the fact that those who favoured the view that the Court could fill gaps were not from common law jurisdictions. This goes to show that the argument is not a tussle between the common law and continental law as it may appear on the face of it. It is more of a coincidence that international law has mostly developed in a similar way as the common law. It seems quite obvious, therefore, that the Committee Members were driven, not by tradition, but the realisation that the restriction of the Court by *non liquet* would practically render it useless and stultify the much needed growth and development of international law.

¹²⁸ *Ibid*, p. 296

It would be safe to conclude, in the light of the points made above, that the Committee actually considered *non-liquet*, but rejected it as an option for the Court in the performance of its judicial activities.

2.14 The Framers of the Statute Ascribed the Same Authority to Judicial Decisions and Writings of Publicists.

On the face of it, the conclusion that the Framers of the Statute intended judicial decisions to be used as a source of law, may give rise to some difficulties that may question the logicity of the conclusion. It may be argued that it is illogical to conclude that judicial decisions were intended as a source of law without reaching a similar conclusion concerning “teachings of the most highly qualified publicists”, which is also contained in article 38(1)(d).

The present view finds nothing in the preparatory work of article 38(1) that placed teachings on a different scale from judicial decisions. Indeed as seen above, during the drafting of the Statute, Descamps had indicated that, in the absence of treaties or custom, the Court should rely on the works of publicists to avoid the blind alley of *non liquet*.¹²⁹ Descamps cited Chancellor Kent for the view that when the greater part of jurisconsults agree upon a certain rule, the presumption in favour of that rule becomes so strong that only a person who makes a mock of justice would gainsay it.¹³⁰ Though objecting to the inclusion of writings of Publicists in paragraph (d), Ricci-Busatti accepted that all the items were being proposed as sources of international law to be applied by the Court.¹³¹ Phillimore stated that teachings of publicists are generally recognised as a source of international law.¹³² In a direct answer to the question put to him by Ricci-Busatti, Phillimore affirmed that it was possible for England

¹²⁹ Proceedings of the Advisory Committee of Jurists, note 44, p. 318

¹³⁰ *Ibid*, p 323

¹³¹ *Ibid*, p 332

¹³² *Ibid*

to accept a sentence based, not on a rule of law accepted as such, but upon the doctrine of legal writers.

Though the Jurists placed judicial decisions and teachings on the same footing,¹³³ practice does not. It is practice that has elevated judicial decisions high and above teachings. The writer rest this view on the practical realities of which Gerald Fitzmaurice reminded us, when he said:

When an advocate before an international tribunal cites juridical opinion, he does so because it supports his argument, or for illustrative value, or because it contains a particularly felicitous or apposite statement of the point involved.... when he cites arbitral or judicial decision he does so for the reasons also, but there is a difference – for additionally, he cites it as something *which the tribunal cannot ignore*, which it is bound to take into consideration and (by implication) which it ought to follow unless the decision can be shown to have been clearly wrong, or distinguished from the extant case, or in some way, legally or factually inapplicable. Equally, the tribunal ... will not usually feel free to ignore a relevant judicial decision, and will normally feel obliged to treat it as something that must be accepted, or else – for good reason – rejected, but must in any event be taken fully into account.¹³⁴

It is thus inconceivable that international lawyers and the ICJ would place greater emphasis on teachings in an era where the case-law of the Court is so robust when compared with the era that the Statute was drafted. In view of the rarity of a consistent case-law of an independent court and the poverty of international law in many areas in 1920, the Drafters needed to include additional guarantees, should no answer be found in positive law, so that the Court would not be hampered by *non liquet*. The inclusion of writings of publicists was, perhaps, one of such guarantees. Besides, writings of publicists being an influential source of international law at that time, the sources of international law for the Court would not have been complete if writings of publicists were omitted.

¹³³ R.Y Jennings, “The Judiciary, International and National, and the Development of International Law” 45 Int’l & Comp. L.Q. 1, 9 (1996) (agreeing that it is an error to place judicial decisions on the same footing as the teachings of the most highly qualified publicists)

¹³⁴ Gerald Fitzmaurice, “Some Problems Regarding the Formal Sources of Law,” *Symbolae Verzijl* 153, 172 reproduced in Martti Koskenniemi Ed. *Sources of International Law*, 57 (Ashgate, Dartmouth 2000)

An indication that writings were once an influential source of law is obvious from older literatures and decisions of Courts. In the 1876 *Franconia case*, involving British jurisdiction three miles seaward beyond low-water mark, Lord Chief Justice Coleridge based the applicable law on “a consensus of writers”. The Judge held that the consensus of writers on the point “established as solidly as, by the very nature of the case, any proposition of international law can be”.¹³⁵ In the same vein, McNair noted that the general expansion of the case-law of the Court, has “completely transformed the international *corpus juris* from a system that rested very largely upon textbooks and diplomatic dispatches into a body of hard law, resembling the common law ...”.¹³⁶ The consequence of this is that the “more the field is covered by decided cases the less becomes the authority of commentators and jurists”.¹³⁷

It should, therefore, be borne in mind that the Statute does not place judicial decisions on a higher rank than teachings of publicists, though they do not carry the same authority in practice.

2.15 Original Intent: The Impact of Article 59 on Article 38(1)(d)

So far the writer has analysed the preparatory work of articles 38(1) and 59 to show that these provisions do not as much have the same origin. The main finding so far is that the drafters of article 38(1) in 1920 and the experts that considered and retained it in 1945 did not evince an intention to create a different category, other than a source of law for judicial decisions. Having so found, it now remains to determine whether this view is negated by the legislative intent regarding article 59. As already indicated, neither the clause, “subject to the provisions of article 59” nor article 59, was in the Draft Scheme of the Jurists. The provisions were,

¹³⁵ *The Queen v. Keyn* L. 1.2 Exch Div, 63. Cited in James Brown Scott, note 38, p., 276

¹³⁶ *Sir Arnold McNair, The Development of International Justice*, 16 (New York, 1954), cited in Mohamed Shahabuddeen, note 96, p. 15. Also see Robert Jennings “An International Lawyer Takes Stock”, 39 *Int'l & Comp. L.Q.*, 519, 519 (1990) (noting “a change in the sources of international law, which had already begun to be felt even in the early 1930s: international law has become a case law”)

¹³⁷ Lord Sumner in *Kronprinzessin Margareta* [1921] AC 486, 495

therefore, not subjected to debate during Committee proceedings. There are also no records to show that the provisions were discussed by the Sub-Committee, which was also made up of distinguished Jurists. As a consequence, the *raison d'etre* for the provision has so far remained within the sphere of speculations.

A number of Commentators contend that the original intent of article 59 was to prohibit the authority of judicial decisions as precedent in the Court. Brownlie's view is of particular interest to this writer. He had argued that the Committee of Jurists which considered the Statute clearly indicated that "article 59 was not merely to express the principle of *res judicata* but to rule out a system of binding precedent".¹³⁸ From what has been said above, Brownlie appears to have overlooked the fact that article 59 was not discussed by the Committee of Jurists. This fact weakens his argument.

2.16 Third party Intervention as the Real Purpose of Article 59

The preponderance of the view that article 59 affects the status to be ascribed to judicial decisions in article 38(1)(d), notwithstanding, it could rightly be garnered from available records that article 59 is historically connected to articles 62 and 63 of the Statute. These articles deal with third party intervention.

By article 62, a State which considers that it has an interest of a legal nature which may be affected by the decision in the case, may submit a request to the Court to be permitted to intervene. Article 63 grants a right to intervene to State parties to a Convention being construed by the Court in a matter to which they are not parties. It specifically provides that if a State party, "uses this right, the construction given by the judgment will be equally binding upon it".

¹³⁸ Ian Brownlie, note 2, p. 21

Historically, the provisions in articles 59 and 63 were joined together in article 84 of the 1907 Convention on Pacific Settlement of International Dispute (Hague I),¹³⁹ as follows:

The Award is not binding except on the parties in dispute.

When it concerns the interpretation of a Convention to which Powers other than those in dispute are parties, they shall inform all the Signatory Powers in good time. Each of these Powers is entitled to intervene in the case. If one or more avail themselves of this right, the interpretation contained in the Award is equally binding on them.

Lauterpacht found that the “close connexion between articles 59 and 63 – indeed the fact that the former is supplementary to the latter – appears clearly from the fact that in article 84 of the Hague Convention 1 of 1907 for the Pacific Settlement of International Disputes (and the corresponding article 56 of the Convention of 1899), the two provisions were placed side by side”.¹⁴⁰ Lauterpacht further observed that the very phrase now used in article 59 of the Statute was proposed at one of the Committees of the Second Hague Conference in connexion with the question of interpretation of multilateral treaties.¹⁴¹ Lauterpacht’s views are largely corroborated by J.H.W. Verzijl. Verzijl compared article 59 with the Hague Convention of 1907 to the effect that what is distributed over two unrelated articles – 59 and 63 of the Statute of the Court – was regulated by a single article 84 in the Hague Convention, which did not contain “*et dans le cas, qui a ete decide*”.¹⁴²

Apart from article 84 of the Hague Convention, article 59 and article 63 provisions were also combined in article 53 of the Five Neutral Power Project, which was presented to the Committee of Jurists for consideration. Article 53 of the Five Neutral Power Project proposed

¹³⁹ October 18, 1907.

¹⁴⁰ Hersch Lauterpacht, note 12, p. 59

¹⁴¹ *Ibid*

¹⁴² “and in respect of that particular case” – J.H.W. Verzijl, note 13, p. 22

that “...sentence shall only apply to the contesting parties, including any intervening parties, and to the particular case upon which judgment has been delivered”.¹⁴³

There is a clear indication that the article must have been inserted by the League Council to protect the interest of third States from being affected by a judgment in which they had not intervened, but certainly not to prohibit rules/principles flowing from such cases from being applied in another case. This indication was given in the Report presented to the League Council by Leon Bourgeois. For its importance, the relevant part of the report is reproduced below:

The observation in the draft project of The Hague by one of our colleagues draw attention to the following case; it might happen that a case appearing unimportant in itself might be submitted to the jurisdiction of the court, and that the court might take a decision on this case, laying down certain principles of international law which if they were applied to other countries, would completely modify the principles of the traditional law of this country, and which might therefore have serious consequences. The question has been raised whether, in view of such an alternative, the States not involved in the dispute should not be given the right of intervening in the case in the interest of the harmonious development of the law, and otherwise after the closure of the case, to exercise, in the same interest, influence on the future development of law. Such action on the part of a non-litigant State would moreover have the advantage of drawing attention to the difficulty of making certain States accept such and such a new development of jurisprudence. These considerations undoubtedly contain elements of great value. The Hague Jurists have not moreover disregarded the necessity of bearing in mind considerations which, if not exactly identical, are at least in the same order of ideas. They have, indeed, given to non-litigant states the right to intervene in a case where any interest of a judicial nature which may concern them is involved. Moreover, article 61 of the Draft lays down that: “Whenever the construction of a convention in which states other than those concerned in the case, are parties, is in question Every state so notified has the right to intervene in the proceedings: but if it uses the right, the construction given by the judgement will be as binding upon it as upon the original parties to the dispute. The last stipulation establishes, in the contrary case, that if a State has not intervened in the case the interpretation cannot be enforced against it. No possible disadvantage could ensue from stating directly what article 61 indirectly admits. The addition of an article drawn up as follows can thus be

¹⁴³ Proceedings of the Advisory Committee of Jurists, note 44, p. 95.

proposed to the assembly: *The decision of the court has no binding force except between the parties and in respect of that particular case.*¹⁴⁴

An intervener under article 62 is in the same position in relation to the decision of the Court as an intervener under 63. The only difference is that an article 62 intervener could intervene, other than as a party within the contemplation of article 59 of the Statute and article 94¹⁴⁵ of the Charter of the United Nations. The connection between articles 62 and 63 on one side and article 59, on the other, is that an intervener, which intervenes as a party removes herself from the protection of article 59 to become bound by the decision in same way that the original parties to the case are bound. On the other hand, a party which does not intervene is protected by article 59 from being affected by the decision.

The language of article 63(2) is, however, worthy of some attention. The language suggests, on the face of it, that the article concerns the “construction” given in the judgment. It would thus appear that article 63(2) creates an exception to what is seen by some writers as the general object of article 59, that a construction adopted in one case is not binding in another case. This is yet one of the many imperfections of the Statute which have been rejected in practice. The use of the word “construction” leaves one with the impression that, in the application of a treaty to concrete factual situations, a rule adopted in the interpretation of the instrument is inapplicable to third parties – a sort of a corollary of a strained interpretation of article 59. This is particularly confusing because the provision appears to maintain the distinction between principles arising from interpretation and the actual decision of the Court. Hence, “the construction given by the judgment”, it envisaged. If that was the case, it would have meant that the rule of construction adopted in a case can be applicable only to future cases in which all the parties had intervened in the earlier case.

¹⁴⁴ Article 8 – Right of Intervention – in the Report presented by the French Representative, M. Leon Bourgeois and Adopted by the Council of the League of Nations at its Meeting at Brussels on October 27th 1920. See League Documents, note 42, p. 32, 50

¹⁴⁵ By which every member of the United Nations undertook to comply with the decision of the International Court of Justice in any case in which it is a party

This absurd formulation could not have been intended by the Drafters, neither has it been followed in practice. To use one example; in *Land and Maritime Boundary between Cameroon and Nigeria*,¹⁴⁶ the rule of construction of article 36(4) of the Statute of the Court adopted in the *Right of Passage over Indian Territory*,¹⁴⁷ was held to be applicable to Nigeria, even as the Court affirmed the distinction between “construction” and “judgment,”. According to the Court, “there can be no question of holding ...[a State] to decisions [judgment] reached by the Court in previous cases”, as “the real question is whether, in this case, there is cause not to follow the reasoning [construction] and conclusions of earlier cases”.¹⁴⁸ In the same vein, the International Law Commission considered that the “general rule clearly is that the act of deposit by itself establishes the legal nexus” adopted by the Court in the *Right of Passage case*, appears to have well settled the question.¹⁴⁹ The only logical understanding this can bring is that constructions in a treaty are not limited only to the original and intervening parties in the case.

The whole purpose of article 63, as could be garnered from the Leon Bourgeois report, was to give State parties to a convention the opportunity to intervene with a view to guiding the Court towards a proper construction of the Convention. In Leon Bourgeois’ words:

The right of intervention in its various aspects, and in particular the question whether the fact that the principle implied in a judgment may affect the development of international law in a way which appears undesirable to any particular state may constitute for it a sufficient basis for any kind of intervention in order to impose the contrary views held by it with regards to this principle.¹⁵⁰

The fact which should remain indisputable is that the construction adopted by the Court becomes part of the convention: that construction (unless overruled) is binding on the Court, and by logical implications, binding on States which shall litigate the same instrument in the

¹⁴⁶ *Preliminary Objection*, ICJ Rep, 1998, 271

¹⁴⁷ *Preliminary Objections*, ICJ Rep 1957, 125

¹⁴⁸ *Cameroon v. Nigeria*, note 146, p. 292 para 28

¹⁴⁹ *Ibid*, pp. 293-294, para 31, citing the Yearbook of the ILC, 1966, vol. II, p.201

¹⁵⁰ Proceedings of the Advisory Committee of Jurists, note 44, p. 46, para 8 of Leon Bourgeois’ Report, note 127

future. This fact is not diminished by the language of article 63. Otherwise, the Court exposes itself to an accusation of bias and negation of the rule of law. This, perhaps, is what makes it necessary for States, to which a rule adopted in the interpretation of a convention may be applied in future, to intervene to guide the court to adopting a construction that truly reflects the spirit and object of the convention.

In view of the above, the present writer cannot but conclude that article 59 was not intended to affect the status of judicial decisions as a source of law in article 38(1)(d) of the Statute.

2.1.7 Judicial Decisions and Rule of State Consent

Beyond the provisions of the Statute of the Court, there is the general question arising from the requirement of State consent. It could thus be argued that it needs not be explicitly stated that judicial decisions are not a source of international law and that the intention is discoverable from the rule of State consent. The rule of State consent generally makes rules of international law binding only on consenting States. It is a rule of international law that “if the States were to be subject to law, that law must emanate from the States themselves. Since States were sovereign and independent they could be bound only through their consent”.¹⁵¹ In the often quoted dictum of the PCIJ in the *Lotus case*, it was stated:

International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between co-existing independent communities.¹⁵²

The ICJ expressed the same view in *Monetary Gold Removed from Rome in 1943*,¹⁵³ where it remarked that international law is generally the product of the consent of States expressed in treaties or customary international law. The Court equally affirmed that the rule of consent is

¹⁵¹ John P. Humphrey, “On the Foundations of International Law,” 39(2) AM. J. Int’l L, 231, 234 (1945)

¹⁵² Note 3, p 18

¹⁵³ (*Preliminary Objections*) ICJ Repts 1954, 19

“a well-established principle of international law embodied in the Court's Statute”.¹⁵⁴ This rule is embodied in articles 36 and 38 of the Statute and article 92 of the UN Charter.

Indeed, rules emanating from judicial decisions are not directly made by States in the manner of treaties, or directly inferable from their practices in the manner of customary international law. Rather, rules in judicial decisions are handed down by a body of judges who lack legislative powers and who should be independent of any State. In consequence, it could be argued that the ascription of lawmaking authority to judicial decisions violates this fundamental rule of international law, except State consent could be furnished one way or the other.

It is not surprising, therefore, that the supposed absence of State consent has been one of the grounds upon which the authority of judicial decisions has been challenged. The Editor of Hersch Lauterpacht's *International Law* contended that because tribunals do not occupy the same position in the international sphere as within the State, namely as organs normally endowed with compulsory jurisdiction, as against the voluntary character of international jurisdiction, the doctrine of judicial precedent as an independent source of law has no place in the international sphere. The Editor further argued that if States were to concede the authority of a source of law to the decisions of international tribunals, they would be endowing them with a competence approaching that of the legislature within the State; observing that States have so far been unwilling to acquiesce in such a limitation of sovereignty.¹⁵⁵

¹⁵⁴*Ibid*, p. 32; See also, I.I. Lukashuk, “The Principle of *Pacta Sunt Servanda* and the Nature of Obligation under International Law”, 83(3) *Am. J. Int'l L.*, 513, 513 (1989), (arguing that “consent is the only way to establish rules that legally bind sovereign States”). Although some commentators, like Romano, subscribe to the view that the rule of consent, “has been gradually reduced, transforming it into a pale simulacrum of its old self”, Romano yet agreed that the principle of consent constitutes the “basic constitutional doctrine of the law of nations.” – Cesare P.R. Romano, “The Shift from the Consensual to the Compulsory Paradigm in International Adjudication: Elements for a Theory of Consent”, 39 *International Law and Politics*, 791, 793 and 795 (2007).

¹⁵⁵Hersch Lauterpacht, *International Law: Collected Papers, Vol. 1 The General Works*, 78 (E. Lauterpacht ed. Cambridge University Press 1970). The Editor, however, agreed that notwithstanding its formal shortcomings in the Statute of the Court, judicial decisions constitute persuasive and within limits authoritative evidence of international law. Also see J. Patrick Kelly, “The Changing Process of International Law and the Role of the World Court” 11 *Mich. J. Int'l L.* 129, 143 (1989-

2.18 Consent Furnished in Variety of Ways

It is the present writer's view that the argument that judicial decisions could not be a source of law in the absence of State consent overlooks the fact that State consent could be furnished in different ways. Though a survey of the different means of furnishing consent by States is outside the purview of this work, it suffices for the present purpose to state that consent could be expressed or implied. Of the main sources of international law contained in article 38(1)(a)-(c), express consent pertains only to the source of international law in article 38(1)(a) – treaties. As regards the other sources, consent is inferred one way or the other from State practice.

2.18.1 Consent to the Statute Furnishes Consent to Principles Adopted by the Court

The perception that judicial decisions lack State consent is more apparent than real. This is because any real problem of lack of State consent that would have arisen was cured by the inclusion of article 38(1)(c) and (d) in the Statute of the Court. Just like other provisions of the Statute, article 38(1), together with all its paragraphs, became binding on States by reason of their consent to the Statute. For this view, reliance could be placed on the view of Judge Armand-Ugon, that:

If international law is based on the agreement of States, either express or tacit, in the case of Article 30 of the Statute a new creative source has arisen. The Permanent Court and the International Court, which were created by States, have the capacity to lay down mandatory rules of law in the same way as any national legislature.¹⁵⁶

1990). (Arguing that, "since international law is the positive creation of sovereign states ... the role of the World Court ... in developing international law is severely constrained. ... The articulation of new norms or expansion of existing norms by a Court violates the consensus foundations of international law".)

¹⁵⁶ Dissenting in *Barcelona Traction*, note 18, p. 116

Though it appears on the face of it that the Judge was generally equating judicial lawmaking with a purely legislative activity, one would find the Judge to be right when the statement is viewed only in the light of article 30, which actually empowers the Court to make rules of procedure. That is, however, not the focus of this writer in the statement. This writer is concerned with showing through the statement that the consent to the Statute supplies consent to every residual lawmaking power exercised by the Court, provided the power was not expressly prohibited. This point was more particularly made in the *Status of Eastern Carelia*, where the PCIJ opined that “consent can be given once and for all in the form of an obligation freely undertaken”.¹⁵⁷ Accordingly, the obligation to abide by the decisions of the Court has the effect of clothing the Court with authority to make international law rules/principles, even if just as between the immediate parties before the Court.

It is the wholesale consent of States to the Statute that supplies particular consent to each rule/principle adopted by the Court. This is irrespective of whether the new rule/principle resulted from corollaries of existing rules of international law or whether the rule/principle resulted from the modification of analogous private law principles. It is, therefore, unnecessary to seek to find the consent of each State to the application of judicial decisions as a source of law. Judges do not create obligations for the parties; they administer justice in the course of which they make rules to elucidate and sometimes govern the obligations already freely entered by States. Though such obligations may require the direct consent of individual State, the rules/principles made by the Court are not in the nature of such obligations to require such consent.

¹⁵⁷ PCIJ, Series B, No. 5, p. 27

2.18.2 Consent to Jurisdiction of the Court Furnishes Consent only in Respect to the Particular State.

There is the argument that consent to the application of rules/principles in judicial decisions could be anchored on the general consent to the jurisdiction of the Court by parties before it. Proposing this argument, Hoof posited that decisions of the Court may be said to be indirect source of international law with respect to the parties to the dispute concerned, if seen in relation to their consent to, or acceptance of the jurisdiction of the Court. He reasoned that, through their acceptance of the jurisdiction of the Court with respect to a given case, the parties consent to, and accept in advance, rules of law which might flow for them from the judgment of the Court. He argued that such consent is confined to the particular case concerned and does not apply to other cases.¹⁵⁸ As for all other States, Hoof furthered argued that the decision of the Court is neither binding nor has an indirect effect.¹⁵⁹ Though agreeing that decisions of the Court may have effects which go far beyond the parties and the particular case, he argued that such binding effects arise from the manifestation of consent or acceptance by such States and not, strictly speaking, from the Court's decision.¹⁶⁰

Care must be taken not to conflate the foregoing with the general power conferred on the Court by the consent of States to the Statute of the Court. Both may appear similar on the face of it, but this apparent similarity disappears when it is realised that each approach provides solutions to different aspects of the same problem, and are at best complimentary. As explained above, consent to the Statute of the Court supplies consent to article 38(1)(d) and gives legal force to the use of judicial decisions as a source of law. Whereas, particular consent to the jurisdiction of the Court in individual cases reinforces the authority already

¹⁵⁸ Hoof, note 2, p. 172

¹⁵⁹ *Ibid*

¹⁶⁰ Maurice Mendelson, "The International Court of Justice and the Sources of International Law" in Vaughan Lowe and Malgosia Fitzmaurice ed. *Fifty Years of the International Court of Justice* 63, 172 (Cambridge University Press 1996)

conferred on the Court (without which the Court would be incompetent in the first place). The jurisdiction of the Court being voluntary, without particular consent to the jurisdiction of the Court the raw materials for judicial legislation will be missing. Of course, States are not obliged to submit their disputes for judicial settlement, even after consenting to the Statute of the Court. Without States submitting their disputes to the Court, there will be no occasion for judicial lawmaking by the Court. This naturally flows from the fact that the Court is a judicial and not a legislative body; judicial lawmaking is only the incidence of the resolution of conflicts through the application of rules/principles to concrete facts.

In relation to the view that consent given in relation to a particular case does not permit the application of rules/principles adopted in other cases, the present writer disagrees. There is no direct correlation between the consent of States to the jurisdiction of the Court in a particular case and the application of rules/principles espoused in previous cases. Consent can only have implications for the actual decision between the parties. This is where articles 59 and 63 of the Statute and article 94 of the Charter come into play. By these articles, it is the parties and no other State that are bound by decisions of the Court.¹⁶¹ Accordingly, consent to the jurisdiction of the Court in a particular case, has no real connection with the previous cases of the Court other than providing the platform for the Court to apply the rule/principles in those cases. The present view is supported by Fitzmaurice. In relation to the decision of the Court in the *Norwegian Fisheries case*, Fitzmaurice argued that though the law established by the Court in the case could be said to apply only to the parties, in theory, no State can successfully contest the general principles laid down in the case. In his words:

Theoretically, the United Kingdom is only bound by this decision to accept the Norwegian baseline-system, as approved by the court. It is not (formally) bound to accept a similar system instituted by any other country. Furthermore, no country other than the United Kingdom is (formally) bound

¹⁶¹ This is discussed in more details in chapter six.

to accept even the Norwegian delimitation. In practice, it is obvious that neither the United Kingdom nor any other country could now successfully contest the general principles of straight baselines, at any rate in any legal proceedings, even (in all probability) before a tribunal other than the international Court.¹⁶²

This view was later confirmed by the Court in the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,¹⁶³ where the Court acknowledged that the "actual rules of law ... which govern the delimitation of adjacent continental shelves - that is to say, rules binding upon States for all delimitations", was given by the Court in its 1969 Judgment in the North Sea Continental Shelf cases".¹⁶⁴ In effect, though the actual judgment in the foregoing cases required particular consent to jurisdiction to bind a State, the "actual rules" emanating from the cases, do not.

This can further be elaborated by the advisory jurisdiction of the Court. Advisory jurisdiction does not require the consent of States as parties. Nonetheless, States have habitually regarded general principles handed down in advisory opinions as authoritative. The *Reparation for Injuries Suffered in the Service of the United Nations*,¹⁶⁵ (which established procedural capacity of international organisation in international law) and *Reservations to the Convention on Genocide*,¹⁶⁶ (which established the modern international law relating to reservations), are obvious examples of this practice.

In essence, the application of rules/principles previously adopted does not flow from the consent of States to the jurisdiction of the Court. That consent is only to the live issues between the parties presently before the Court and in respect of which the Court gives a binding decision in line with articles 59 of its Statute and 92 of the UN Charter.

¹⁶² Gerald Fitzmaurice, note 115, p., 170. It was in the *Norwegian Fisheries case (United Kingdom v Norway)*, ICJ Rep 1951, 116, that the ICJ endorsed the straight baseline method of delimitation of the continental shelf. It was on the authority of this case, that Iceland issued a new Fishing Regulation which adopted the straight baseline system. But the United Kingdom contested these new Regulations contending that they go beyond what was endorsed by the Court in the Case – *Fisheries Jurisdiction (United Kingdom and Iceland)*, Merits, ICJ Rep 1974, 3, 11 para 22

¹⁶³ ICJ Reps 1984, 246

¹⁶⁴ *Ibid.*, p. 299 para 112

¹⁶⁵ ICJ Rep 1949, 174

¹⁶⁶ ICJ Reports 1951, 51

It is also the present view that, by that consent, States submit themselves to the application of rules/principles in decided case to their cause.

2.18.3 Consent through Acquiescence

This occurs when States, as is usually the case, request the Court to apply rules/principles adopted in a previous decision to their case. Such a rule/principle may have arisen from the interpretation of a treaty or from the use of one of the several guises of judicial lawmaking, discussed in chapter seven.

When States argue on the basis of such rules/principles and sometimes even base their entire case on them, the only logical explanation would be that such States are expressing consent to the said rule/principles, albeit *ex post facto*. By so doing, States acquiesce in rulemaking by the ICJ and naturally expect, when espousing their cause before the Court, that their case would be treated similar to an analogous precedent.

As we shall see later, there exist several rules/principles of international law, whose source lie nowhere, but within the case-law of the Court. This is in addition to the fact that both the Court and States, in practice, attach juridical character to the case-law of the Court, notwithstanding that the rules/principles are not traceable to a treaty or customary rules.

States are not in the habit of disputing the normative value of rules/principles in judicial decisions. The common feature in the decided cases of the Court is that States accept the existence of the rules/principles in previous cases and endeavour to distinguish their cases if that rule/principle does not favour their cause. In *Maritime Delimitation and Territorial Question between Qatar and Bahrain*,¹⁶⁷ Bahrain sought to rely on the decision of the PCIJ in

¹⁶⁷ *Merits*, ICJ Reps 2001, 40, 76, para 112

the case of the *Société Commerciale de Belgique*,¹⁶⁸ and the ICJ cases in *Arbitral Award made by King of Spain on 23 December 1906*¹⁶⁹ and *Maritime Delimitation between Guinea-Bissau and Senegal*¹⁷⁰ to support her case. Qatar on her part denied the relevance of the judgments cited by Bahrain, contending that “None of them are in the slightest degree relevant to the issue which the Court has to determine in the present case ...”.¹⁷¹ Had Qatar not recognised the authority of the rules/principles in the cases sought to be relied upon by Bahrain, it would have simply based its argument on this point. Qatar’s approach is replicated in all cases in which the decision of the Court depended on rules/principles established in its precedent.

There has been no situation where a State argued that a rule/principle established, or a construction adopted in a previous case is not applicable due to want of consent. At worst, the adverse party would ask the Court to change the law by overruling its earlier position. This was the approach of Nigeria in *Cameroon v. Nigeria*.¹⁷² Here, Nigeria requested the Court to overrule the principle of interpretation adopted in the *Right of Passage case*.¹⁷³ In the latter case, the Court had held that the provision of article 36(2) of the Statute of the Court requiring transmission of the declaration of a State accepting the compulsory jurisdiction of the Court to all parties to the optional clause system was merely permissive. In consequence, a declaration of acceptance was valid against a party to which it had not been transmitted by the Secretary General of United Nations. This ruling was in response to the preliminary objection raised by India against the case instituted by Portugal while its declaration was yet to be transmitted to India. When Cameroon brought proceedings against Nigeria in analogous circumstances and Nigeria raised a preliminary objection proffering a similar argument as

¹⁶⁸ P.C.I.J Series A/B, No. 78, p. 160

¹⁶⁹ (*Honduras v. Nicaragua*) ICJ Reps 1960, 192

¹⁷⁰ ICJ Reps 1991, 53

¹⁷¹ *Ibid*

¹⁷² Note 146

¹⁷³ Note 147

that used by India, the *ratio* of the *Right of Passage case* became a fundamental part of the proceedings. Nigeria categorically urged the Court to overrule the *Right of Passage case* because it was a first impression case and that the judgment given was outdated. The Court refused to overrule the case, and did apply the precedent to dismiss the objection of Nigeria. States do not only rely on the rules/principles adopted in decided cases; they sometimes attempt to expound the principles to new factual situations. In *Fisheries Jurisdiction*,¹⁷⁴ Spain sought to rely on the *Right of Passage case* for the proposition that reservations contained in declarations of acceptance of the compulsory jurisdiction of the Court are to be interpreted consistently with legality and that any interpretation which is inconsistent with the Statute of the Court, the Charter of the United Nations or with general international law, is inadmissible. This argument followed the reasoning of the Court in the *Right of Passage case* that "[i]t is a rule of interpretation that a text emanating from a Government must, in principle, be interpreted as producing and as intended to produce effects in accordance with existing law and not in violation of it".¹⁷⁵ Rejecting the proposition, the Court held that the decision in the *Right of Passage case* cannot admit of such interpretation in that: "Nowhere in the Court's case-law has it been suggested that interpretation in accordance with the legality under international law of the matters exempted from the jurisdiction of the Court is a rule that governs the interpretation of such reservations".¹⁷⁶

Can it, in the light of the frequent engagement by States of rules/principles established by the Court, be said that States do not confer, even if *ex post facto*, juridical force on the rules/principles by their subsequent conduct? It can surely be argued that the frequent reliance on rules/principles adopted by the Court, confirms the authority of rule/principles in judicial decisions. This view finds support in the reasoning of the Court that:

¹⁷⁴ (*Spain v. Canada*), *Jurisdiction and Admissibility*, ICJ Rep, 1998, 432, 455, para 53

¹⁷⁵ *Ibid*, p. 455, para 53

¹⁷⁶ *Ibid*, para 54

If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself...the significance of that attitude is to confirm rather than to weaken the rule.¹⁷⁷

Accordingly, the reliance placed by States upon rules/principles adopted in other cases, strengthens the view that States accept judicial decisions as a legal source from which binding rules/principles of international law may emerge. Therefore, so long as States appeal to rules/principles in judicial decisions and seek justifications from such rules/principles for their conducts makes the argument that such rules/principles are rules/principles of international law, difficult to be discredited by any argument predicated upon the lack of express State consent.

2.19 Customary Practice of Regarding Judicial Decisions as a Source of International Law

Further to the above, a rule of customary international law could be constructed upon the persistent reliance by States of rules/principles in judicial decisions. For this to be, it must be shown that judicial decisions as a source of law is supported in the practice and *opinio juris* of States. The cases cited above show that the practice of States relying on previous decisions of the Court is fully entrenched. *Opinio juris* can be gauged from the weight States attach to rules/principles in decided cases, both within and outside the processes of litigation. States would not base their cases on rules/principles adopted by the Court if it is not believed that the rules/principles are rules/principles of international law.

Indeed it is often the case that States refer to rules in judicial decisions as rules of international law. In *Maritime Delimitation in the Black Sea*, Ukraine contended that the Court is obliged to decide disputes in accordance with international law as laid down in

¹⁷⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States)*, Merit, ICJ Rep 1986, 14, 98 para 186

Article 38, paragraph 1 of the Statute. In defining the relevant principles of international law, Ukraine specifically referred to “a body of rules of international law comprising ... rules which have become well established in the jurisprudence of the Court”.¹⁷⁸

Further evidence of *opinio juris* is in the fact that States generally look up to the Court to settle, with certainty, controversial issues of law. In the era before the ICJ affirmed the obligatory nature of provisional measures, the Law of the Foreign Relations of the United States stated as follows:

The Court has not ruled on whether an order ‘indicating’ provisional measures is mandatory on the parties. It is not clear what effect the failure of a State to comply with provisional measures has on the decision in the principal case.¹⁷⁹

It was admitted that:

as the Statute of the Court uses the ambiguous word ‘indicate’ rather than ‘order’ or ‘determine’ there has been uncertainty as to whether the Court’s orders indicating provisional measures are binding.¹⁸⁰

This was the same approach taken by Cecil Hurst in his advice to the British government in the controversy surrounding the accession of the United States to the Protocol of Signature to the Statute of the PCIJ. Cecil Hurst had based his advice on the decision of the PCIJ in *Eastern Carelia case*,¹⁸¹ with the hope that the Court would “gradually build up a rule of law on this point”.¹⁸²

The International Law Commission is not left out of the general endorsement of the authority of rules/principles in judicial decisions. In the commentary on its provisional draft on the exchange or deposit of instruments of ratification, approval, ratification and accession, the

¹⁷⁸ (*Romania v. Ukraine*), ICJ Rep 2009, 61, 77, para 36

¹⁷⁹ The American Law Institute Restatement of the Law Third, Restatement of the Law of the Foreign Relations of the United States Vol II s. 903, Comment, p 358 (St Paul Minnesota: 1987)

¹⁸⁰ *Ibid.*, Reporters’ note 6, p. 368

¹⁸¹ Note 95

¹⁸² Note 96

Commission considered that the question relating to the moment at which the consent to be bound is established and in operation with respect to other contracting States, in the case of the deposit of an instrument with a depositary, appears well-settled by the ICJ in the *Right of Passage case*.¹⁸³

Based on the foregoing, it is arguable that States have created a customary rule by which they accept rules/principles emanating from the decisions of the Court as rules/principles of law by which some of their conducts are regulated. This, in effect, would mean that even if consent to judicial lawmaking cannot be founded in the Statute of the Court, it could be founded in customary international law emanating from the practice and *opinio juris* of States in relation to the case-law of the Court.

2.20 Development Independent of Consent

Another way of looking at rules/principles in judicial decisions is to see them as seamless rational deductions from the very concept of international justice, which could form without the consent of States to their existence. This view was canvassed by Quincy Wright, who argued that the Jurists who adopted judicial decisions as subsidiary means for determining rules of law, in 1920,

repudiated jural positivism and accepted the Grotian thesis that international law rests not only upon the practice of states, but also upon rational deduction from the principles of justice to which they aspire. The makers of the Statute recognized that international law should not be limited by the positive consent of states, but should be capable of developing through juridical deduction from normative principles endorsed by prevailing world opinion.¹⁸⁴

This could be explained by the way customary international law relates to State consent. Though *opinion juris* and practice (as means of establishing consent) are germane to the establishment of the existence of customary international law against a State, it is yet common place that States are sometimes held to be bound by customs which they did not

¹⁸³ The Yearbook of the International Law Commission, 1966, Vol. II, p.201, Para 3

¹⁸⁴ Quincy Wright, "Legal positivism and the Nuremberg Judgment", 42 Am. J. Int'l L 405, 408 (1948)

partake in establishing. Writing nearly a century ago, De Visscher recognised that “it is not always necessary to be able to prove that ... [a] state, by its personal actions, contributed to the establishment of the international practice from which the rule derived....”¹⁸⁵ This view finds support in the Separate Opinion of Judge Fouad Ammoun in *Barcelona Traction case*, where he drew attention to the fact that “certain customs of wide scope became incorporated into positive law when in fact they were the work of five or six powers”.¹⁸⁶

This is the same way rules/principles in judicial decisions may integrate into the corpus of what is often referred to “as general international law”. Its origin being neatly concealed in that moniker, it becomes irrelevant that a particular rule actually originated from judicial decisions.¹⁸⁷

In the final analysis, it is important to reiterate that the preparatory work of the Statute does not support the view that the framers of the Statute did not intend to ascribe the status of a source of law to judicial decisions. To back up this view, the writer has engaged in a detailed analysis of the preparatory work with particular attention on articles 38(1) and 59. The writer has also argued that the conclusion that the Drafters did not evince that intention is not negated by the general rule of State consent.

¹⁸⁵ De Visscher, *La Codification du droit international*, 6 *Recueil Des Cours*, 225, 261-262 cited in Prosper Weil, “Towards Relative Normativity in International Law?” 77 *AM. J. Int’l L* 413, 434(1983)

¹⁸⁶ Note 35, p. 308

¹⁸⁷ This is discussed in chapter five

Chapter Three

Relevance of Judicial Decisions in Article 38(1)(d) of the Statute of the Court

Since June 28, 1923, when the Permanent Court of International Justice (PCIJ) gave its first ruling in *S.S. Wimbledon*, the contribution of the Court to modern international law has been profound. Notwithstanding, the recurrent question of the status of judicial decisions in article 38(1)(d) has remained shrouded in the classical abhorrence for judicial legislation. The question is as old as the institution of a permanent international court itself; it came up in the deliberations of the 1920 Committee of Jurists that drafted the Statute of the Permanent Court of International Justice, and resonated in both judicial and scholarly literatures throughout the lifespan of that Court. The question has been carried through to the International Court of Justice (ICJ),¹ without a generally agreed answer.

This question has been partly discussed in chapter two. In that chapter, the writer examined the preparatory work of articles 38(1) and 59 of the Statute of the ICJ with a view to discovering whether the provisions were intended to exclude judicial decisions from the sources of international law. The writer found nothing in the preparatory work suggesting or affirming that judicial decisions were not relevant as a source of law. If anything, the preparatory work strongly suggested that judicial decisions were intended to be a source of law. The problem, however, is that this intention was not unequivocally communicated in the Statute in view of the language of article 38(1)(d) and the supervening provisions of article 59, which has added nothing, but confusion and obscurity to article 38(1)(d).

¹ Though no significant alteration was made, available record shows that the question was discussed in the course of considering the ICJ Statute. See the "Report of the Informal Inter-Allied Committee on the Future of the Permanent Court of International Justice," 10th February 1944 39 Am. J. Int'l L. Supp. 1, 1, 20 (1945)

In this chapter, the writer shall seek to show that judicial decisions are a source of law even upon a literary construction of article 38(1) of the Statute. In doing this, the writer shall concentrate on the provisions of article 38(1) and endeavour to discuss article 38(1)(d) as if there were never an article 59. This approach is being adopted because the sources of international law are prescribed in article 38(1) and not article 59. The latter is a supervening or intervening provision, without which the former could stand on its own, free from ambiguities. This is fundamentally so because the reference to article 59 in article 38(1)(d) and article 59 itself were not in the original draft of the Statute, when the sources of the law to be applied by the Court were deliberated upon by the Committee of Jurists.

Also, the writer is convinced that it is the general approach of discussing articles 38(1)(d) through article 59 (though that approach is justified by the words “subject to article 59”) that is responsible for the view that judicial decisions are not a source of international law on the terms of the Statute. Scholars often conclude on the basis of article 59, without first discovering article 38(1)(d) for what it actually is. For instance, Brownlie’s view that judicial decisions are not a source of law is based on the argument that article 59 does “not merely express the principle of *res judicata* but to rule out a system of binding precedent”.² Likewise, Burns H. Weston, Richard A. Falk and Anthony D’ Amato argued that by virtue of article 59, judicial decisions have no binding force except in respect of particular cases.³ It would, therefore, be useful to first ascertain whether the provisions of article 38(1)(d),

² Ian Brownlie, *Principles of Public International Law*, 21 (7th ed. Oxford University Press, 2008)

³ Burns H. Weston, Richard A. Falk, Anthony D’ Amato, *International Law and the World Order*, 130 (2nd ed. West Publishing Company, Minnesota 1990). Also see Maurice Mendelson, “The International Court of Justice and the Sources of International Law” in Vaughan Lowe and Malgosia Fitzmaurice ed. *Fifty Years of the International Court of Justice* 63, 81 (Cambridge University Press 1996). (stating that “the direction in article 38(1)(d) of the Statute to apply ‘judicial decisions ... as subsidiary means for the determination of rules of law’, is subject to article 59, the effect of which is that there is no doctrine of binding precedent in the ICJ”); D.W Greig, *International Law*, 39 (Second ed. Butterworths: London 1976) (stating that article 59 of the Statute poses a barrier to the adoption of a general doctrine of precedent.). J. Patrick Kelly, “The Changing Process of International Law and the Role of the World Court” 11 *Mich. J. Int’l L.* 129, 144 (1989-1990). (Arguing that the ICJ lacks the authority to perform a major law-creating function.... judicial decisions are only a subsidiary means for determining rules of law. Even this modest recognition is limited by article 59. There is no doctrine of *stare decisis* at the Court”)

standing alone, provide justification for the view that judicial decisions are a source of law. Thereafter, article 59 and its relationship with article 38(1)(d) shall be discussed.

3.1 Decisions of the International Court of Justice as a Source of International Law

The exact meaning of the term “sources”, when used in relation to law, appears to be controversial. This is because “sources” could mean different things depending on the context of its use. The common trend is for authors to distinguish between formal and material sources. On the precise meaning to be ascribed to the terms “formal” and “material” sources, there are also no agreement. Richard K. Gardener posited that formal sources are the actual historical and factual origin of the laws while material sources are those supported by the rules of recognition within the legal system; the criteria for identifying what the law is.⁴ J.W Salmond argued that a formal source is that from which a rule of law derives its force and validity while material sources are those from which is derived the matter, not the validity, of the law. He argued that material source supplies the substance of the rule to which formal source gives the force and nature of law.⁵ On the contrary, Ian Brownlie dismissed the use of the term “formal source” as awkward and misleading because there is no constitutional machinery of law-making in the creation of rules of international law.⁶ This, perhaps, explains why a number of authors, such as Herbert Briggs⁷ and Colbert⁸ have noted that “sources” is being confused with various other things.

⁴ Richard K. Gardiner, *International Law*, 25 (Pearson Education Ltd, England, 2003)

⁵ J.W Salmond, *Jurisprudence*, 24 (7th Ed. 1924)

⁶ Ian Brownlie, *Principles of Public International Law*, 1 (7th ed. 2008)

⁷ Herbert Briggs, *The Law of Nations*, 44 (2nd ed. NY 1952), cited in Vladimir Duro Degan, *Sources of International Law*, 1 (The Hague: Kluwer Intl Ltd 1997) (Briggs observed that “sources” is often confused with, basis of international law; causes of international law and evidence.) On his part, Vladimir Duro Degan (*Ibid*) noted that “many different, and even opposite, meanings are ascribed to this term [sources]”.

⁸ P.E. Corbett, “The Consent of States and the Sources of the Law of Nations,” 6 *Brit Y.B Int’l L*, 20, 20, 30 (1925) (Noting that sources is used by different writers, sometimes even by the same writer at different times, to express concept of cause, origin, basis and evidence, and that the fluctuation in terms has regrettable consequences. He further contended, “that the origin of the rules of international law which may also be called ‘the sources’ of that law – though the word ‘sources’ has such a history of confusion behind it that it might well be abandoned – are the opinions, decisions or acts constituting the starting-point from which their more or less gradual establishment can be traced”.)

Away from the controversies surrounding the term, it suffices, for the purpose of this study, to adopt the definition of Herbert Briggs. Briggs simply defined sources of international law as “the methods and procedures by which international law is created”.⁹ This definition best explains the core of this thesis, which generally concerns the methods of creation of international law, though specifically focusing on one of the methods or means specified in 38(1) of the Statute of the Court. Article 38(1) provides:

1. The court, whose functions is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - (a) International conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
 - (b) International customs, as evidence of a general practice accepted as law;
 - (c) The general principles of law recognized by civilized nations;
 - (d) Subject to the provisions of article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations as subsidiary means for the determination of rules of law.¹⁰

It is conducive to reasoning to posit that these provisions have, in view of the duration of time in which they have been accepted as a statement of the sources of international law and the number of States that have expressly subscribed to it, become a rule of customary international law.¹¹ In consequence, the provisions are equally applicable as a statement of customary international law even to States which are not bound by the Statute of the Court.

This is so because, a State does not necessarily need to be a party to a convention which terms have been assimilated into customary law, to be bound by the terms of the Convention.

In *Certain Questions of Mutual Assistance in Criminal Matters*,¹² the Court held that the

⁹ Herbert Briggs, note 7, p. 44

¹⁰ Christopher C. Joyner, “U.N. General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm Creation” 11 Cal. W. Int’l L.J 445, 454 (1981), (stating that article 38 is “[t]he most convenient and concise statement regarding the sources of international law.”); Wolfgang Friedmann, *The Changing Structure of International Law*, 188 (London, Stevens & Sons 1964), (stating that article 38 is an authoritative formulation of the sources of international law in general, inside or outside the International Court of Justice)

¹¹ Dinah Shelton, “Normative Hierarchy in International Law”, 100(2) Am. J. Int’l L 291, 294-295 (2006) (Stating that “although the ICJ Statute is directed at the Court, it remains today the only general text in which States have acknowledged the authoritative procedures by which they agree to be legally bound to an international norm.”)

¹² (*Djibouti v. France*) ICJ Rep 2008, 177, 219, para. 112

provisions of article 31 of the Vienna Convention on the Law of Treaties, 1969, were applicable to both Djibouti and France (which were not parties to the Convention) because the provision codified customary international law. This position is not altered by the subsequent assimilation of a conventional provision into customary law.

The *erga omnes* status of article 38(1) of the Statute of the Court could also result from the fact that the Statute is an integral part of the Charter of the United Nations.¹³ Being so, it is a treaty in force, arising from the agreement of parties to the Charter of the United Nations, to which 193 States are parties. As a consequence, it is generally agreed that article 38(1) is an expression of the sources of law, not only for the Court, but for the international community at large. What is not easily conceded is the relevance of the items in paragraph (d) to the formation of international law.

3.2 Judicial Decisions and the Language of Article 38(1)(d)

So far, the writer has followed the view that the sources of international law are expressed in article 38(1) of the Statute of the Court. Judicial decisions having been included in article 38(1) to which, at least, the signatory States to the Charter of the United Nations have consented, makes it highly probable that judicial decisions are, by reason of that consent, a source of international law. It is at this point only probable because it has to be seen that the States did consent to that provision with the belief that judicial decisions are a source of law. This is particularly so because judicial decisions, in the language of article 38(1)(d), are “subsidiary means for the determination of rules of law”, and are subject to article 59, by which decisions of the Court are binding only on the actual parties to a case.

¹³ Article 92 annexed the Statute of the Court as “an integral part of this Charter.” By article 93(1) “All members of the United Nations are *facto* parties to the International Court of Justice”.

3.3.1 As Subsidiary Means

The major problem which has arisen from the provisions of article 38(1) is the reference to judicial decisions as “subsidiary means for the determination of the rules of law”. This term has been variously interpreted to mean different things within different contexts. Some have argued that the term is used to denote judicial decisions because the rules/principles they contain are derived from other sources. In this wise, Hugh Thirlway argued that the reason for the distinction introduced into article 38(1) by the term, “as subsidiary means for determination of the rules of law”, is that a rule of law stated in judicial decisions is stated as deriving from either treaty, custom or general principles of law.¹⁴ Also in *Oppenheim’s International Law*, the Editors argued that decisions of courts and tribunals are a subsidiary and indirect source of international law. They opined that since judges do not, in principle, make law but apply existing law, their role is inevitably secondary given that the law they propound has some antecedent source.¹⁵

There is also the view that construes the term to mean that judicial decisions are a subordinate – a gap-filling – source to be resorted to when there are no rules of treaty or custom governing the issue before the Court. In Hudson’s view, what is meant by “subsidiary” is not clear; it may mean that the sources mentioned in paragraph (d) are to be subordinate to other sources mentioned in the article, i.e. to be regarded only when sufficient guidance cannot be found in international conventions, international customs and general principles of law.¹⁶

¹⁴ Hugh Thirlway, “Sources of International Law” in Malcolm D. Evans ed. *International Law*, 115, 129 (2nd ed. Oxford University Press 2006)

¹⁵ Jennings Robert and Sir Watts Arthur (ed.) *Oppenheim’s International Law*, 41 (9th ed. Vol. 1, Longman 1922)

¹⁶ Manley O. Hudson, *The Permanent Court of International Justice 1920-1942. A Treatise*, 612 (Louis B Sohn ed., New York: Garland Publishing, Inc. 1972)

This seems to be the light in which the term was understood by the Informal Inter-Allied Committee on the Future of the PCIJ. In its Report:

The provision in question [article 59] in no way prevents the Court from treating its judgments as precedents, and indeed, it follows from article 38 ... that the court's decisions are themselves 'subsidiary means for the determination of rules of law.'¹⁷

If, following the language of the Report, the Court is entitled to treat its decisions as precedents,¹⁸ it would mean that the Committee regarded the term "subsidiary means for the determination of rules of law", as connoting something of a secondary nature to something else, apparently, the items mentioned in paragraphs (a)-(c). This view was confirmed by Judge Fouad Ammoun in his separate opinion in *Barcelona Traction Light and Power Company Ltd*,¹⁹ where he affirmed that "international case-law is itself only an auxiliary source of law and does not take the place of the principal sources, which are treaties and customs".

On a different note, there are some other authors who believe that the phrase does not truly capture the essence of judicial decisions as a source of law. With this belief, Patricia Birnie, Alan Boyle and Catherine Redgwell argued that the reference in the Statute to judicial decisions as "subsidiary means..." is apt to mislead, given that, in reality, the Court has an important and often an innovative role in pronouncing on matters of international law. They affirmed that, in the process of identifying and applying the law, the Court can "exercise a formative influence on the law, giving substance to new norms and principles".²⁰ Also, Rosalyn Higgins observed that far from being treated as a subsidiary source of international law, the judgments and opinions of the Court are treated as authoritative pronouncements

¹⁷ Note 1, para 63

¹⁸ "...experience shows that the effect of judicial precedent – even if not formally recognised as a source of law – cannot always be distinguished from a source of law" – Hersch Lauterpacht, *International Law: Collected Papers, Vol. 1 The General Works*, 78-79, (E. Lauterpacht ed. Cambridge University Press 1970)

¹⁹ (*Belgium v. Spain*) (*Second Phase*) ICJ Rep 1970, 3, 315, para 21

²⁰ Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, 28-29 (Oxford University Press 3rd ed.).

upon the current state of international law.²¹ In seeming agreement with these views, Rosenne argued that the decisions of the ICJ cannot be relegated to any subsidiary position. He argued that the expansion of a body of international case-law is leading to a judicial codification or at least restatement of the law through application to concrete circumstances.²² It is, perhaps, for this reason that Wolfgang Friedmann said that, “treaties, customs and judicial decisions are in fact the three principal sources of legal authority in the international community”;²³ and Kelsen agreed that “in addition to customs and treaties, decisions of international agencies, especially judgments of the international tribunals, are sources of international law”.²⁴

It should follow from the foregoing that the status of judicial decisions, within the context of article 38(1), largely depends on the construction of the phrase, “as a subsidiary means for the determination of the rules of law”. If the phrase is construed to mean that rules emanating from judicial decisions, are by reason of that phrase, not authoritative for the Court and States to whose cases they are applied, it would follow that judicial decisions cannot be a source of law on the terms of the Statute. But if subsidiary means is construed to mean something secondary, it would mean a term that separates paragraph (d) of article 38(1) from the first three paragraphs in a sort of hierarchy in which paragraph (d) occupies a secondary position.

The first impression one gets from article 38(1) is that, by virtue of judicial decisions being a subsidiary means for the determination of the rules of law, they do not create rules of law but only serve as a means for determining rules of law. To avoid sticking with this superficial impression of the provision, it would be useful to separate for a moment, the words, “subsidiary means” from the “determination of rules of law”. Aside giving a deeper

²¹Rosalyn Higgins, *Problems and Process: International Law and How We Use It*, 202 (Clarendon Press, Oxford, 1994)

²²Shabtai Rosenne, *The Law and Practice of the International Court* 612 (Vol. 2 A.W. Sijthoff-Leyden 1965).

²³Wolfgang Friedmann, note 10, p. 188

²⁴Hans Kelsen, *Principles of International Law*, 506 (2nd ed., Robert W Tucker Ed., Holt, Rinehart and Winston, Inc. 1966)

understanding of the provision, it would enable us apply them within the context of the entire provisions of article 38(1).

3.3.2 Article 38(1) Requires a Unity of Interpretation

Taken on its own; “subsidiary means” could conveniently be interpreted to mean “residuary means.” This ordinarily tallies with the definition of the term “subsidiary”, which means: “added”, “extra”; and the opposite of “chief”, “main” or “principal.” Merriam-Webster’s Online Dictionary defines “subsidiary” as referring to something “of secondary importance”, something of an auxiliary character. It thus follows that the existence of a “subsidiary means” presupposes the existence of a “principal means”. This easily fits into the context of article 38(1), which already enumerated what was undoubtedly regarded as main or principal sources in paragraphs (a)-(c) before “subsidiary” was used to classify the items in paragraph (d). Christopher C. Joyner appears to support this view by asserting that article 38(1) placed the principal sources of international law hierarchically, “as treaty law, customary law, and general principles of law, with judicial decisions and the works of publicists relegated to a secondary position”.²⁵

In this light, when “subsidiary means” is construed together with the term “for the determination of the rules of law”, there is the problem of upsetting the entire context of article 38(1). This is because, such an approach would suggest the existence in article 38(1) or in anywhere else, a “main or principal means” for the determination of the rules of law and thus give the impression that article 38(1) is concerned with merely stating the means for the determination of the rules of law. This is all the more confounding in view of the fact that the said phrase – “determination of the rules ...” – was first ever mentioned in paragraph (d), where the term subsidiary was also used. To add meaning and purpose to article 38(1), there

²⁵ Christopher C. Joyner, note 10, p. 455 (1981)

must be a unity of interpretation, which would either mean that all the items mentioned in article 38(1) are means for the determination of the rules of law or that the items are actually sources of law.

In view of the opening paragraph of the article and the uses to which it has firmly been put over time by both judges and jurists, it is not difficult to dismiss the first interpretation. But upholding the second interpretation may not be any less controversial than dismissing the first. This is because the second interpretation requires that “subsidiary” be read within the context of that unity to mean “residuary” or “auxiliary”, which would in turn mean that “subsidiary” is used to divide the article into “main” and “residuary” or “primary and secondary” sources of international law – a view which not many writers have accepted. It would follow from above, that if judicial decisions are auxiliary or supplementary to the other items in the article, it could either be auxiliary or supplementary source of law while those items are the main or principal; or judicial decisions would be auxiliary or supplementary means for determination of the rules of law while the former would be the principal means of determination of the rules of law.²⁶

The veracity of the view that judicial decisions are a secondary or supplementary source of law while the items in paragraphs (a) –(c) are the main or principal sources of law, is obvious from the deliberations of the Committee of Jurists.²⁷ In the original draft of article 38, Descamps had used the word “auxiliary” to explain the role being ascribed to judicial decisions in the Statute.²⁸ Judicial decisions were to be an auxiliary or supplementary source of law to be applied by the Court, failing the main sources mentioned in the preceding paragraphs of the article. It is equally correct to affirm from the deliberations of the Jurists,

²⁶ See the history of the provision in chapter two above

²⁷ Some Writers treat only treaties and customary law as the main sources of international law. See Dinah Shelton, note 11, p., 319

²⁸ See chapter 2 for a detailed discussion of the view of the Committee of Jurists on this.

that this was the light in which “auxiliary” or “subsidiary” was understood by the Jurists. This understanding is borne out of the arguments of the Jurists and the various amendments that were sought to be made to the provision at different stages of deliberations. It is on records that a number of the Jurists, including Descamps, were in agreement with Root’s amendment, which used the “authority of judicial decisions”.²⁹ So was the further amendment of “rules of law derived from judicial decisions”, proposed by Lapradelle.³⁰

The expression “subsidiary means” was proposed by Descamps only after Phillimore proposed that the words “rules of law derived from judicial decisions” be deleted. “Subsidiary means” may therefore have been adopted to satisfy dissenting Committee Members – Ricci-Busatti and Lapradelle, especially – who wanted to see the entire paragraph (d) expunged from the draft Statute. The need for the distinction between paragraphs (a) –(c) and (d) may also have been engineered by the argument of Ricci-Busatti that it was wrong to place judicial decisions and doctrines on the same level with treaties and customs.³¹

Furthermore, the original proposal of Descamps did not contain any classification of the five items mentioned in the article. He had simply proposed that the sources be applied in the “under-mentioned order”. The Judges of the Court were to consider the sources in their order of enumeration. In addition to this, the original draft of the provision had judicial decisions as a means for “...the application and development of law”³² – a term which, more or less, reflects the practical uses of judicial decisions by the Court. In his *Separate Opinion in*

²⁹ See p. 70 above

³⁰ See p. 72 above

³¹ Process-Verbaux of the Proceedings of the Committee of Jurists June 16-July 24, 1920, p. 334

³² Hoof argued that the choice of the words; “application” and “development” of law which featured in Descamps proposal was “not entirely free from ambiguity because the ‘former entails reference to already existing law, while the latter entailed at least some elements of newness and, therefore, suggests that judicial decisions create new law and in that sense are sources of international law’. – Godefridus J. H Hoof, *Rethinking the Sources of International Law*, 169 (Kluwer: the Netherlands 1983). One is left wondering whether the words eventually used in the Statute do not import far more ambiguity than the ambiguity Hoof associates with the original proposal.

Barcelona Traction case,³³ Judge Fitzmaurice referred to judicial pronouncements as the principal method by which the law can find some concrete measure of clarification and development, absent specific legislative action with direct binding effect in the international legal field. In *Reparations for Injuries Suffered in the Service of the United Nations*, Judge Alvarez recognized the Court as possessing the power to develop international law and to contribute to its creation in the face of new situations.³⁴ This was affirmed by the Court in *Maritime Delimitation and Territorial Question between Qatar and Bahrain*, when it referred to rules “developed since 1958 in case-law” and State practice with regard to the delimitation of the continental shelf and the exclusive economic zone.³⁵

If what we were presented with was “judicial decisions as a subsidiary means for the application and development of law”, this perhaps, would have fitted into the context of the provision. This is because there is no real difference between law-making and law-development; they are both processes of formulating and expanding the law.³⁶ Since this is not the case, this writer is of the view that, given the ambiguity that results from construing judicial decisions as a subsidiary means for the determination of rules of law, the better view, and indeed the one that conforms to the practice of the ICJ; one in which States habitually acquiesce, is that judicial decisions are a subsidiary source of law while the items in paragraphs (a)-(c) are the main sources of law. This view appears in tandem with the view of Rosalyn Higgins, who after stating that the function of the Court is to decide in accordance with international law, such disputes as are submitted to it, affirmed that article 38(1), “goes on to say exactly what the Court would apply in fulfilling this task: the well-known sources

³³ Note 19, p. 64, para 2

³⁴ ICJ Rep 1949, 174, 190, (Separate Opinion)

³⁵ Merit, ICJ Reps 2001, 40, 112, para 231

³⁶ As stated by Judge Alvarez in the *Reparations case*, note 36, “in many cases it is quite impossible to say where the development of law ends and where its creation begins”. Also see Mohamed Shahabuddeen, *Precedent in the World Court*, 68 (Cambridge University Press, 1996) (arguing that “the inquiry mind would encounter difficulty in accepting that ... development ... can fail to eventuate in creation of law at some point”.)

of international law – namely, custom ... judicial decisions ...”.³⁷ This view is also supported by the bold statement of R.Y. Jennings that:

Perhaps this is the point where, having spoken of judicial decisions as a direct source of international law, I should explain that I have not forgotten that article 38 of the Hague Statute speaks of judicial decisions as a “subsidiary means for the determination of the rules of law”. This provision, I understand as a necessary recognition that judges, whether national or international, are not empowered to make laws. Of course, we all know that interpretation does, and indeed should, have a creative element in adapting rules to new situations and needs, and therefore also in developing it even to an extent that might be regarded as changing it. Nevertheless, the principle that judges are not empowered to make new law is a basic principle of the process of adjudication. Any modification and development must be seen to be within the parameters of permissible interpretation.... accordingly, I see the language of article 38 as essential in principle and see no difficulty in seeing a subsidiary means for the determination of rules of law as being a source of law, not merely by analogy but directly.³⁸

It is obvious from the above that paragraph (d) suffers from a problem of language; a language that was goaded by the fear that article 38 would not be accepted by States if paragraph (d) was not crafted in a very cautious language to defuse the notion that the Court was being expressly granted the power to formulate international law – a function which judges do not formally enjoy in the municipal legal systems. This is in view of the fact that article 38(1) was formulated by the Jurists alongside the rule of automatic compulsory jurisdiction adopted by the jurists. It would have been easier for the head of a camel to pass through the eye of a needle than for States to accept automatic compulsory jurisdiction alongside resting the power judicial legislation upon the Court.³⁹

³⁷ Rosalyn Higgins, note 21, p. 187

³⁸ R.Y Jennings, “The Judiciary, International and National, and the Development of International Law”, 45, *Int'l & Comp. L.Q* 1, 3-4 (1996)

³⁹ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 22 (Cambridge: Grotius Publications Ltd, 1987) (observing that article 38 involves a juridical problem which confronts all systems of law, and being so universal a problem, the theories and practice developed in municipal law in this connection have exerted their influence upon the minds of those called upon to deal with it in the international sphere).

In doing this, though, it seems the Drafters of the provisions, envious of the wisdom of the common law and foreseeing that the system of codification that sustains the continental system was not readily achievable, knew that it would be unwise to completely expunge judicial decisions from article 38(1). Hence the Committee steered the middle course by adopting a language which though appears to neutralise the authority of judicial decisions in theory, yet allows the Court to make the most authoritative use of it in practice as well as make the greatest contribution possible to the development of international law. This was no doubt the light in which the Inter-Allied Committee on the future of the PCIJ, saw article 38(1)(d). The Committee accepted that the language was problematic. It nonetheless, did not recommend its amendment because, “it seems to have worked well in practice”.⁴⁰ It could be garnered from the Report that the Inter-Allied Committee firmly supported the practice of judicial law-making, which obviously was what the Committee considered to “have worked well in practice”, though article 38(1)(d) suffers from the problem of language.

In this part the writer has argued that “subsidiary means” plays a crucial role in the controversies surrounding the status of judicial decision in article 38(1). This, notwithstanding, the writer argued that the provision would be more logically construed by seeking a unity of all the provisions in the article. This unity the writer found in using “subsidiary means” to divide the items in the article into main and secondary sources of international law. The writer has been emphatic in arguing that, “subsidiary means” did not remove paragraph (d) from the sequence of consideration of the sources in article 38(1), though prescribing for judicial decisions, a different status – subsidiary status – to show that rules/principles in judicial decisions are not of equivalent status as any of the rules in the preceding paragraphs. It is worth restating, also, that this interpretation is at this point

⁴⁰ Note 1, p. 20

independent of article 59 for the reason already explained above. It remains tentative until the impact of article 59 in practice is fully accessed subsequently.

3.4 The Question of Hierarchy

Due to the chances of the points made above about the hierarchical representation between judicial decisions in paragraph (d) and the preceding paragraphs being seen within the context of the general controversy surrounding the question of the hierarchy of sources in article 38(1), it is important to briefly discuss the question relating to the general hierarchy of all the sources in article 38(1).

This is another controversial aspect of article 38(1) on which there are also conflicting opinions. A view holds that article 38(1) did not create a hierarchy of sources in view of the sovereign equality of States and the equivalence of the sources of international law. The contrary view holds that the article did create a hierarchy which should be followed in the order in which the sources appear in the article. In support of the first view, Pierre-Marie Dupuy, argued that on the basis of the Statute of the Court and the sovereign equality of States, there is no hierarchy and none can logically exist because, international rules are equivalent, sources are equivalent, and procedures are equivalent, all deriving from the will of States.⁴¹ The author further remarked that the texts of article 38(1) made no reference to hierarchy, except by listing doctrine and judicial decisions as "subsidiary" and evidentiary sources of law.⁴² Gerald Fitzmaurice observed that, save for the classification of judicial decisions and teachings of publicists, as "subsidiary means" article 38(1) does not establish any system of priority of application.⁴³ Also Bin Cheng, argued that the order of enumeration in the article is not intended to reflect a juridical hierarchy but merely to indicate the order in

⁴¹ Pierre-Marie Dupuy, *Droit International Public*, 14-16 (1995) cited in Dinah Shelton, note 11, p. 291

⁴² *Ibid.*, p. 294-295

⁴³ Gerald Fitzmaurice, "Some Problems Regarding the Formal Sources of Law," *Symbolae Verzijl* 173, 174 reproduced in Martti Koskeniemi Ed. *Sources of International Law*, 57 (Ashgate, Dartmouth 2000)

which they would normally present themselves to the mind of an international judge when called upon to decide a dispute in accordance with international law.⁴⁴

Judge Koroma appears to take the opposite view in reasoning that:

Article 38 of the Statute provides that the Court in deciding disputes should do so in accordance with international law, and should apply: "(a) international conventions ... (d) subject to the provisions of Article 59, judicial decisions ... as subsidiary means for the determination of rules of law." In other words the Article establishes a hierarchy as to the application of the law, and the Court is called upon to determine - to find out - what the existing law is in respect of the dispute before it and to apply that law.⁴⁵

Although Judge Koroma spoke of a hierarchy here, it is unclear from the passage whether he was speaking about a general hierarchy of the provisions or the hierarchy between the main and subsidiary sources.

On his part, Schwarzenberger steered the middle course; observing that article 38(1), being silent on the question of hierarchy, it would be possible but hardly convincing to attempt to draw any conclusion from the enumerative sequence of the article.⁴⁶

Following the approach of the Court in the *North Sea Continental Shelf Cases*,⁴⁷ it is clear that the article is presented in an order that places the first three paragraphs on the same plane to be considered sequentially. In the case, the Court stated that:

the first question to be considered is whether the 1958 Geneva convention on the Continental Shelf is binding for all the PartiesClearly, if this is so, then the provisions of the Convention will prevail in the relations between the Parties, and would take precedence of any rules having a more general character, or derived from another source.⁴⁸

⁴⁴ Bin Cheng, note 39, p. 22

⁴⁵ Dissenting, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria,)* Preliminary Objections, ICJ Rep 1998, 275, 380

⁴⁶ Georg Schwarzenberger, *International Law*, 54 (vol. 1 3rd ed. Stevens and Sons: London, 1957)

⁴⁷ ICJ Rep 1969, 3, 24 para 25

⁴⁸ *Ibid*, p. 24, para 25

Accordingly, it was after the Court had determined that the said Convention was inapplicable between the parties to the cases that it resorted to finding whether there was a rule of customary international law applicable to the parties.

This approach conforms to the views expressed during the deliberations of the Committee of Jurists. During Committee deliberations, members were agreeing that the first duty of the judge is to the items mentioned in paragraph (a) – (c), which the judge must consider successively before having recourse to paragraph (d), absent applicable principles in the paragraph (a) – (c). Stating the order in which the Court must proceed, Descamps had explained that the Court must first examine the text of a convention and apply same, if any; failing conventional rule, the Court will apply custom. If no rule is found in either, rather than plead *non liquet*, the Court should resort to general principles of law and the work of publicists.⁴⁹ To these it must invariably be added, judicial decisions.

That this non hierarchical sequential consideration was the intention of the Committee, is borne out of the fact that in the original draft of article 38, which did not have the words “subsidiary means”, the sources were to be considered “in the under-mentioned order”.⁵⁰ It is germane to state that the above remark by Descamps was made before the article was redrafted to reflect its present language.

It may therefore be useful to consider that article 38(1) is structured for a sequential consideration that does not necessarily create hierarchical superiority, in a sense suggestive of the notion of a basic or constitutional norm.⁵¹ Although it is mandatory for the Court to

⁴⁹ Proceedings of the Committee of Jurists, note 31, p., 318

⁵⁰ *Ibid*, Annex 3, p. 306 and 344

⁵¹ Notwithstanding, it is worth noting the view of Kelsen that, given the fact that the binding force of a treaty is due to a rule of customary international law – *pacta sunt servanda* – “the reason for the validity of treaties, and hence the ‘source’ of all

consider the provisions of treaty law, should any exists between the parties, it by no means follows that the existence of a treaty automatically invalidates analogous customary law; though this may be strong evidence that the parties intended to modify or abrogate the application of a contrary customary rule between them. But nothing stops a rule of custom similar to a treaty (even if they are not exactly of the same content) from contemporaneously existing with that treaty provision. As a corollary, the ICJ has shown that the existence of a treaty rule does not preclude the consideration of a parallel customary law.

In *Military and Paramilitary Activities in and against Nicaragua*,⁵² the Court considered that even if a treaty norm and a customary norm relevant to a dispute were to have exactly the same content, this would not mean that the operation of the treaty must necessarily deprive the customary norm of its separate applicability.⁵³ The judgment of the Court further shows that such a parallel custom becomes paramount, whenever the application of an analogous treaty between the parties is excluded, say by way of reservation, as such a reservation would not affect the operation of the custom.⁵⁴

It thus follows that the only order of superiority there may be, is that prescribed by article 53 of the Vienna Convention on the Law of Treaties, which provides that, “a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law” – *jus cogens*. For the avoidance of doubt, the same provision defines *jus cogens* as:

a peremptory norm of general international law [which] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

the laws created by treaties”, customary international law is superior to treaties. (note 24, p 446) This necessarily conforms with his proposition that “the norm which regulates the creation of other norms is ‘superior’ to the norms which are created according to the former”. Hans Kelsen, note 24, p. 437. This is however a more profound question to which the scope of this work does not extend.

⁵² (*Nicaragua v. the United States*) Merit, ICJ Rep 1986, 14

⁵³ *Ibid*, p. 94, para 175

⁵⁴ *Ibid*

This consideration may have influenced Sorensen's distinction between a hierarchy of rules and a hierarchy of sources.⁵⁵ The sources may share equivalent hierarchy but certain of their rules may carry greater efficacy. It is for these reasons difficult to lay down a general rule of hierarchical supremacy between the main sources – particularly treaties and customs – given that *jus cogens* could as much arise from either of them, so that the question of supremacy works in both directions.⁵⁶ As a consequence, whenever the question of supremacy arises between the main sources, there cannot be a blanket ascription of superiority to the rules from a particular source; the rules in question must be treated on their merit on a case by case basis. Nonetheless, a particular rule (usually in a treaty) existing between the parties (as *les specialis*) takes precedence over any general rule that may be found to exist respecting a subject-matter.

The implication of this is that while a subsequent treaty may modify or abrogate a prior custom and *vice versa*, rules in judicial decisions would generally not have such effect until such a rule becomes applicable as a rule of custom or as what the Court sometimes vaguely refers to as rules/principles of general international law. However, the *Reparation case*⁵⁷ seems to challenge this assertion. The *Reparation case* is famous for the rule that international organisations are competent to bring international claim to espouse a right of diplomatic protection before the ICJ, contrary to the pre-existing rule of customary

⁵⁵ Sorensen, *Principles de Droit International Public, Recueil des Cours*, 1960-III, 5-245 cited in Maarten Bos “The Hierarchy among the Recognised Manifestations (Sources) of International Law” 25(3) *Netherlands International Law Rev.* 334,340 (1978).

⁵⁶ In *Nicaragua case* note 52, p. 100, para 190, the Court affirmed the view of the International Law Commission that the law of the Charter concerning the prohibition of the use of force was a conspicuous example of a *jus cogens* rule of international law. This was shortly after the Court affirmed the analogous customary rule as a cardinal principle of law.

⁵⁷ Note 38

international law encapsulated in article 34 of the Statute of the Court and Chapter XIV of the Charter of the United Nations.⁵⁸ The pre-existing rule was that only States could do so.

Although this may be rationalised by claiming that the pronouncement of the Court was the necessary incidence of the Charter of the United Nations, on a closer scrutiny it was just another judicial legislation in disguise. According to Judge Alvarez::

The fact of recognizing the United Nations as possessing the right to bring international claims constitutes a derogation from the precepts of the international law now in force, for that law only attributes this right to States.⁵⁹

Despite this obvious conflict the rule contained in the case has gained currency in both academic and judicial literatures. Hence we were reminded in a completely different case of the duty on the Court to create the new international law by modifying outdated concepts; and of the fact that the “Court already exercised this faculty” in the *Reparations case*.⁶⁰ It must still be borne in mind in spite of the foregoing that it is not open to questioning that article 38(1) did not place judicial decisions on equal footing with treaties and customs.

3.5 The Inevitability of Judicial Legislation in an Un-codified System of Law

In addition to the above, it should be appreciated that judicial law-making is an inescapable product of the existence of a permanent court,⁶¹ which functions within a largely un-codified system of law. If the Court must truly function as a court, it cannot but make rules/principles if it must achieve its goals. Under the present system, article 38(1)(a)-(c) require the Court to

⁵⁸ It is clear from the Charter that it created a Court open only to States. The pre-existing rule was previously affirmed by both the PCIJ and the ICJ. In *Mavrommatis Palestine Concession*, P.C.I.J., Series A, No. 2, p. 81, where Judge de Bustamante, dissenting, reiterated the prevailing rule that the League of Nations was prevented from appearing before the Court as a party by the restrictive terms of article 34 of the Statute of the Court. In *South West Africa Cases (Second Phase)*, ICJ Rep, 6, 277, 493, Judge Mbanefo, dissenting, remarked: “as by article 34 of the Court’s Statute, the League not being a State, could not itself be a party to an action in the international Court. Only States or members of the League could be parties in cases before the Court”.

⁵⁹ Separate Opinion, *Reparation case*, note 34, p., 191. Judge Krylov, dissenting, acknowledged the conflict between the rule stated by the Court and existing rules of international law. (p. 218).

⁶⁰ Per Judge Alvarez, dissenting in *International Status of South-West Africa*, Advisory Opinion, ICJ Rep 1950, 28, 177

⁶¹ R. Floyd Clarke, “A Permanent Tribunal of International Arbitration: Its Necessity and Value”, 1 Am. J Int’l L. 342, 407 (1907). As early as 1907, Clarke had noted that “a permanent court would ... develop an international law of precedents whose value, as a model of settling disputes ... would be priceless”.

apply the pre-existing rules of treaty, custom or general principles of law, but absent any of these, the Court is entitled to invoke the subsidiary means of its case-law and teachings of publicists to fill a lacuna and prevent *non liquet*.⁶²

Indeed, sight must not be lost of the teleology of article 38(1). It is obvious from the analysis of the history of the provision in chapter two, that the main thrusts of article 38(1) was the avoidance of *non liquet*. As demonstrated in the next chapter, the Court cannot and has not been able to do this without recourse to rules/principles in its precedents, when all other sources fail. The Court has robustly revealed that the fact that decisions bind only parties thereto does not alter the actuality that the rules/principles of international law underpinning specific decisions have general applicability. Therefore, judicial decisions cannot but have relevance as law insofar as they generate and develop rules/principles of international law, not just as applicable in specific cases but also with wider implication for all other cases bearing analogous facts.

On the whole, the phrase, “as a subsidiary means for the determination of rules of law”, although seems, on the face of it to suggest that judicial decisions are not a source of law, that initial appearances dissolves upon a holistic consideration of article 38(1), as done above. The writer feels justified to conclude that the only plausible interpretation of article 38(1) is that judicial decisions are a source of law within the meaning of that article. Also, that the term “subsidiary means” places judicial decisions on a different – a secondary – category from the main sources of treaties, customs and general principles of law.

⁶² See Cherif Bassiouni, “A Functional Approach to “General Principles of International Law”, 11 Mich. J. Int’l L. 768, 777 (1980-1990) (in support of what he called the “evolutive aspect of the law” through case-law and works of writers, argued that recourse to case-law and works of scholars injects a dynamic element into international law and prevents the application of archaic norms and procedures.)

Chapter Four

Relevance of Judicial Decisions in the Practice of the ICJ

In chapter two, the writer acknowledged the general rule that, if interpreted in its ordinary and natural sense, a treaty provision makes sense, its ordinary and natural meaning shall govern the application of the treaty. The writer also stated that preparatory work and practice could be called in aid, where a provision is ambiguous and capable of different interpretations. Article 38(1), particularly paragraph (d), falls within the description of ambiguous provisions requiring elucidation of its natural meaning through other interpretative aids. This explains the writer's reliance on the history and practice relating to the provision.

Its ambiguity notwithstanding, the writer interpreted paragraph (d) in chapter three and arrived at the conclusion that judicial decisions are a source of international law, albeit supplementary or auxiliary. Given that this conclusion is not generally favoured in the literature, it became imperative that the interpretation draws support from either the preparatory work of the provision or the practice of the Court pertaining to the provision or both. The writer has already concluded, upon an in-depth examination of the preparatory work, that it supports the view that judicial decisions are a source of international law. The writer shall now examine the practice of the Court to show that the conclusion to which the preparatory work points have not been modified in the practice of the Court. The writer intends to show that the practice of the Court strongly corroborates the view that judicial decisions are a source of international law.

Before proceeding further, it is important to reiterate the point made in chapter one. It was stated that it shall be argued that the Court follows its precedent, not for the purpose of

adopting *stare decisis*, but because it has identified certain rules/principles contained in the precedents which it wants to follow. This argument shall come to light in this chapter, as it shall be argued that the common law principle of *stare decisis* has no real relevance to the question relating to lawmaking by the ICJ. This is particularly in view of the point made in chapter that judicial lawmaking is a feature of both the common law and civil law, despite the absence of the rule of *stare decisis* at civil law. While not totally ignoring the possible influence of the common law on the approach of the Court, the writer shall emphasise the indisputable fact that rules/principles of law do arise from judicial decisions, irrespective of the absence of *stare decisis*.

4.1 The Importance of the Practice of the Court

The fundamental role of the practice of the Court to an inquiry of this nature cannot be over-emphasised. This was extensively discussed by Judge Fitzmaurice in his separate opinion in *Certain Expenses of the United Nations*, thus:

...no one would deny that practice must be a very relevant factor. According to what has become known as the "principle of subsequent practice", the interpretation in fact given to an international instrument by the parties to it, as a matter of settled practice, is good presumptive (and may in certain cases be virtually conclusive) evidence of what the correct legal interpretation is – a principle applied by the Court on several occasions....¹

In application to an institution created and regulated by treaty (as the ICJ), it would equally be tenable that the correct interpretation of a provision in the enabling treaty could be inferred from the consistent practice of the institution – particularly when the practice is not opposed by parties to the treaty. This is particularly so because article 38(1) was formulated for the use of “the Court, whose functions is to decide in accordance with international law” – a faculty the Court has successfully exercised for nearly a century in which it has resolved

¹ ICJ Rep 1962, 151, 201

serious and, sometimes, recondite questions of international law in adjudicating disputes between States. It is, therefore, inevitable that the Court would have built up a clear practice regarding the authority of judicial decisions, as reliance on its precedent has been a major feature of its practice. As is the case with many provisions, the ultimate direction of provisions in an instrument is dictated by how the provisions operate in practice. A provision may operate in a fundamentally different sense from what could be collected from a theoretical examination of the provisions. It is practice that best illuminates a difficult provision. In the words of Judge Spender:

It is of course a general principle of international law that the subsequent conduct of the parties to a bilateral-or a multilateral instrument may throw light on the intention of the parties at the time the instrument was entered into and thus may provide a legitimate criterion of interpretation.²

For practice to be decisive, however, it must reflect the generality of the parties. Where the practice is by a few, it rests on the same footing as unilateral conducts and has less probative value.³

The practice of following precedent is not only that of the Court but also of the States that appear before it. More often than not, States ask the Court to apply precedent; they base their arguments on rules/principles in precedent and ask the Court to follow suit. This has been the established practice of all the States appearing before the Court. In the *second Genocide case*, the Court observed:

... Parties are not merely citing previous decisions of the Court which might be regarded as precedents to be followed in comparable cases. The previous decisions cited here referred to the question of the status of ... FRY, in relation to the United Nations and to the Statute of the Court; and it is that same question in relation to that same State that requires to be examined in the present proceedings at the instance, this time, of Croatia. It would require compelling reasons for the Court to depart from the conclusions reached in those previous decisions.⁴

² *Separate Opinion in Certain Expenses*, *ibid*, p. 189

³ *Ibid*, p. 191

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, ICJ Rep 2008, 412, 429, Para 54.

As will soon be seen, the practice of the Court cannot be divorced from those of the States appearing before it as the practice of the Court is encapsulated in the application of international law to conflicts between States. Accordingly, the practice of the Court concerning the application of rules/principles adopted in a case to another, commands great relevance as it also reflects the practice of States appearing before it.

4.2 The Relevance of the Common Law Rule of Binding Judicial Precedent to the Authority of the Decisions of the ICJ

It is essential to discuss the rule of binding precedent and define its scope in relation to the practice of the ICJ. It is equally essential not to sacrifice an objective analysis of paragraph (d) and the obvious practice of the Court for the popular view that in the event of the absence of the common law rule of binding precedent, judicial decisions in paragraph (d) are not a source of international law. The topic must be approached free from the bias towards or against the English doctrine of precedent; it is one thing for the decisions of a Court to be a source of law and another thing for that result to be achieved through the common law doctrine of *stare decisis*. Whether it is viewed from the continental perspective of *jurisprudence constante* (requiring the court to constantly act on a rule to be law) or the common law case law approach (which does not require so long a practice); in none of the systems can it rightly be disputed that decisions of courts are sources from which legal rules/principles are constantly distilled.⁵

The question whether the English rule of binding precedent is applicable in the ICJ ought to be tangential and not central to the question whether judicial decisions in paragraph (d) are a source of law. The fact is often overlooked that paragraph (d) is a provision in the Statute of a

⁵Hersch Lauterpacht, "The So-called Anglo-American and Continental Schools of Thought under International Law," 12 Brit Y.B. Int'l L 31, 54 (1931) (observing that "there exists in France and in Germany a judge-made case law, and the authority of judicial precedent is not alien to those countries. It is not, however, the authority of single cases and precedents which is decisive, but their cumulative and growing weight".)

Court created for a system that is entitled to develop in its own peculiarities. The first duty is to understand the relevance of judicial decisions within the context of the Statute as elucidated in the practice of the Court. The crucial question is whether judicial decisions constitute sources from which rules/principles of international law could originate; it is rules/principles that give juridical expressions to judicial precedents.⁶ Accordingly, judicial decisions would invariably be a source of law once they are repository of rules/principles having the quality of law.

However, it does not follow that a comparison of the approach of the Court with the common law rule of *stare decisis* cannot be made. Such an exercise provides an analogical platform for ascertaining the authority of judicial decisions in a Court that appears to display, towards its precedents, all the attributes of a common law court. Just like common law courts, the ICJ reasons by analogy: it treats like cases alike; and employs the distinguishing technique. An understanding of the operation of *stare decisis* under the common law would, no doubt, illuminate the approach of the Court, without necessarily assimilating it with the common law. Accordingly, and without affirming that the Court operates the *stare decisis* rule, the writer finds it important to discuss some features of the common law system which are similar to the approach of the ICJ.

It is true that the Court does not operate the strict rule of *stare decisis*. This is not because the rule is prohibited by its Statute or excluded in its practice; it may be due to other reasons such as the absence of the structural hierarchy for such a system to thrive in its strict sense within the legal system in which the Court operates. It may also be the result of the fact that the judges of the Court are selected from diverse legal backgrounds: the judges neither share a

⁶ On this view, writers are agreeing. See Rosalyn Higgins, *Problems and Process. International Law and How We Use It*. 203 (Clarendon Press, Oxford, 1994) (stating that though on the formal level State Z is not bound by the judgment in a case to which it was not a party, State Z is however bound by relevant rule of international law articulated by the Court in that case.)

common legal system or a common legal tradition. So that, by relieving the Court from dictates of a particular system, judges of the Court retain freedom to operate unhindered by any particular legal system or legal tradition. Nonetheless, the fact that the common law system has a great influence on the practice of the Court cannot be correctly disputed by any scholar who has achieved some depth in the study of the approach of the Court towards its precedents. The similarities of the approach of the Court with the common law system seem to enjoy dominance over its similarities with any other system of law; but despite their similarities, it is the right caution to emphasise that the practice of the ICJ cannot be approached with the stricture of the common law system of the compulsion of vertical precedent.

If we were to go by the common law doctrine of *stare decisis*, we would discover that judicial precedent does not consist of only the rule that compels a lower court to follow decisions of a higher court – vertical precedent. It also includes the psychological belief by a higher court that it has a duty to maintain certainty through consistency of its decisions, by adherence to its previous decisions. Also, that a precedent once set cannot be lightly overruled – horizontal precedent. The difference between vertical and horizontal precedents is that while the former requires strict adherence,⁷ the latter allows the court that set the precedent, the power to overrule it, should occasions call for it. For instance, while every other court below the Supreme Court of Nigeria is bound to follow the decisions of the Supreme Court, there is no duty on the latter to strictly adhere to precedents. The Court is at liberty to overrule its precedents, when occasions call for it. The same situation obtains in England. The antiquated rule that the House of Lords cannot reverse a precedent has since been whittled down: the

⁷ See *Rodriguez de Quijas v. Shearson*, 490 U.S. 477, 484 (1989) (holding that “if a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this [the Supreme] Court the prerogative of overruling its own decisions”.)

House of Lords is now able to depart from a precedent when it is in the interests of justice to do so.⁸

Unless overruled, a precedent set by an apex court within a system of binding precedent has continuous applicability, not only for the lower courts within the hierarchy, but also for the apex court; though the latter may decide not to follow the precedent. Therefore, the concept of binding precedent is a relative concept in a court that has the ultimate power to set and overrule precedents in comparison to a lower court. By virtue of its structure – being a court of first and final jurisdictions⁹ – the ICJ can only maintain a horizontal precedent, which in itself, does not require the strict application of *stare decisis*.

Generally, whether vertical or horizontal, Salmond thought the doctrine of precedent had two meanings: (a) it may mean that precedents may be cited, and will probably be followed by the court – the sense in which it is understood in the continental system;¹⁰ (b) it may mean that precedents, not only have great authority but must (in certain circumstances) be followed – the sense in which it is understood in England.¹¹ The practice of the court appears to reveal a hybrid of both systems, while yet maintaining its peculiarities. It was, perhaps, with this in mind that Hersch Lauterpacht observed that:

Without adopting the common law doctrine as to the binding force of the single precedent, and while disregarding formal prohibitions reminiscent of legal provisions in individual continental codes, the practice of the Court has become an instructive manifestation of the intrinsic merits – inevitably revealing themselves under every system of law – of judicial precedent.¹²

⁸ See Practice Statement (Judicial Precedent) (1966) 3 All E.R. 77, Per Lord Gardiner LC

⁹ Article 60 of its Statute makes its judgments final and without appeal. The Court sometimes enjoys appellant jurisdiction, when such a jurisdiction is granted by a treaty. See *Appeal Relating to the Jurisdiction of ICAO Council*, ICJ Rep 1972, p. 46; *Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, Judgment of 15 December, 1933*, Series A/B PCIJ

¹⁰ P.J. Fitzgerald, *Salmond on Jurisprudence* 142 (12th ed., Sweet & Maxwell 1956)

¹¹ *Ibid*

¹² Note 5, p. 61

In the circumstance, and as the writer shall show later, there is a sort of judicial lawmaking operating in the Court in a latent and concealed manner and revealing itself in the form of binding rules/principles rather than in the English rule of *stare decisis*. Accordingly, the absence of *stare decisis* does not by any means detract from the fact that the ICJ makes a habit of applying the rules/principles enunciated and applied in previous cases to future cases involving similar subject-matters, and between completely different parties. Neither does it deny the conscious and consistent efforts of the Court to maintain certain legal consequences (once established by it) to analogical factual situations. It is, therefore, imperative to focus on what the Court has identified as, “the real question”,¹³ which “is whether ... there is cause not to follow the reasoning and conclusions of earlier cases”.¹⁴

Having laid this foundation, the writer shall now proceed to examine how the Court relates with its precedents, in practice. Before proceeding, it is important to reiterate the key point made above. The point is that *stare decisis* is not a pre-requisite for judicial legislation; and as a corollary, its absence in the ICJ does not preclude its decisions being sources of law. It is also useful to recall the point set out in chapter one that though the court always tries to maintain consistency of rules/principles from previous cases, it is sometimes prevented from achieving this by political consideration and the dictates of what may be regarded as international public policy.

4.3 The ICJ Follows Precedent

The decided cases of the Court are replete with languages and patterns confirming the use of precedent by the Court. In *the Interhandel Case*,¹⁵ the Court said it will “base itself”,¹⁶ on the

¹³ *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, ICJ Reps 1998, 275, 292 para 28

¹⁴ *Ibid*

¹⁵ (*Switzerland v. United States*), ICJ Rep 1959, 6

¹⁶ *Ibid*, p. 24. The Court does not only use the term “base itself” in relation to its previous decisions. It also uses the term in relation to other instruments being relied upon by it. In the *Anglo-Iranian Oil Company Case*, ICJ Reps 1952, 93, 103, the

precedent established in *Nationality Decrees issued in Tunis and Morocco*¹⁷ to the effect that in the event that two litigating States hold divergent views on a question of international law, which involves the interpretation of an international engagement, the question cannot be held to fall solely within the exclusive jurisdiction of a single State. In *Malaysia v. Singapore*,¹⁸ an aspect of the Court's decision was reached in view of "its previous jurisprudence". Here the Court relied on the precedent in *Eastern Greenland case*,¹⁹ establishing that a tribunal which has to adjudicate on a claim to sovereignty over a territory must take account of the extent to which sovereignty is also claimed by some other States. The ICJ held that if this principle was valid with reference to the thinly populated and unsettled territory of Eastern Greenland, it should also be valid in the case of *Malaysia v. Singapore*. This, in the reasoning of the Court, is because just as was the facts of the former, the latter case involved a tiny uninhabited and uninhabitable island, to which no claim of sovereignty had been made by any other Power throughout the years from the early sixteenth century until the middle of the nineteenth century.²⁰ In the *Oil Platforms case*,²¹ the Court said it "sees no reason to vary the conclusion it arrived in 1986 [in the *Nicaragua case*]".²² Here the Court was interpreting article XX paragraph 1(d) of the *Treaty of Amity, Economic Relations and Consular Rights* between the United States and Iran. The Court acknowledged that the text was open to two different interpretations. However, the Court decided that it would follow the interpretation earlier adopted by it while interpreting a similar treaty between the United States and

Court "based itself" on the Iranian Declaration. This goes to show that when the Court says that it is basing itself on a previous decision, it means that it is applying the authority of that decision. In *Ahmadou Sadio Diallo (Guinea v. DRC)* Judgment of November 30, 2010, p. 18, para 41-42, the Court said it was "drawing upon" and shall "apply in the present case" the "two alternative tests" formulated in *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections*, ICJ Reps 1992, 261, on when an additional claim can be admissible

¹⁷ Series B, No. 4 pp. 29-30.

¹⁸ *Sovereignty over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge*, ICJ Rep 2008, 12, 101 Para 297.

¹⁹ *Legal Status of Eastern Greenland*, PCIJ Advisory Opinion, Series A/B, No. 53, p. 46.

²⁰ *Malaysia v. Singapore*, note 18, p. 36, Para. 66.

²¹ *(Islamic Republic of Iran v. United States)*, *Preliminary Objections*, 1996 ICJ Rep, 803

²² *Ibid*, p. 811, para 20.

Nicaragua. In *Armed Activities on the Territory of the Congo*,²³ the Court said it was following the threshold established in *Military and Paramilitary Activities in and against Nicaragua*²⁴ for the sufficiency of control of paramilitaries by State organs.

The view of the Court in some cases strongly suggests that it does not regard the practice of following precedent as an optional one. The Court had held that it, “will not depart from its settled jurisprudence unless it finds a particular reason to do so”;²⁵ and also that “precedents [are] to be followed in comparable cases”.²⁶

It is worth noting also that the Court consciously perpetuates its precedents by applying them over and over again in analogous and deserving cases. This carries the possibility of judicial decisions qualifying as law through constant application even from the viewpoint of the continental rule of *jurisprudence constante*. In *Nicaragua v. Honduras*²⁷ the Court had earlier applied the *Eastern Greenland case*²⁸ for the same principle concerning sovereignty of uninhabited territory, for which the case was subsequently applied in *Malaysia v. Singapore*.²⁹ In *Nicaragua v. Honduras*,³⁰ the Court had to determine which of the opposing evidence of effectiveness adduced by the parties, was sufficient proof of the effective exercise of powers appertaining to the authority of any of the States to sustain a claim to sovereignty over the disputed territory. The Court stated that four conditions must be fulfilled to sustain a claim of sovereignty on that basis. They are: (a) the intention and will to act as sovereign; (b) some actual exercise or display of such authority; and (c) the extent to which sovereignty is also claimed by some other Power.³¹ The Court expressly admitted that these

²³ (*DRC v. Uganda*), ICJ Rep 2005, 168, .226 para 160.

²⁴ (*Nicaragua v. the United States*), Merit, ICJ Rep 1986, 14

²⁵ The second *Genocide*, note 4, p. 17-18, para 53-54

²⁶ *Ibid*, p 17, para 54

²⁷ *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea*, ICJ Rep 2007, 659

²⁸ Note 19

²⁹ Note 18

³⁰ Note 27

³¹ *Ibid*, p. 712, para. 172-174

conditions were distilled from the *Eastern Greenland case*,³² when it held that Nicaragua did not satisfy the criteria formulated by the PCIJ in the *Eastern Greenland case*.³³

In the application of rules/principles in a precedent, the ICJ is systematic and not arbitrary. It is as methodological as common law courts and applies all the techniques which govern the systematic application of precedents in common law courts. The Court reasons by analogy; it would not apply a rule/principle adopted in a decided case to another case, except the facts are sufficiently analogous. And when the facts are not so analogous to justify the application of the rule/principle, the Court employs the distinguishing technique to justify the inapplicability of the precedent. The writer shall now discuss these methods.

4.3.1 Distinguishing Inapplicable Precedents

A precedent is distinguished when the Court identifies factual dissimilarities between the facts for which a rule/principle was previously adopted and the facts of the case being decided. It could also be done on the basis of dissimilarities in applicable laws. On the basis of the dissimilarities identified by the Court, the applicability of the precedent to the dissimilar case is excluded. By distinguishing the cases, the Court affirms the authority of the rules/principles contained therein by showing that its inapplicability is not due to any intrinsic defect as a source of law but only on the factual or legal differences between the case for which the rule/principle was adopted and the case at hand. In effect the Court is simply holding that the rule/principle applies to a different factual or legal situation.

In *Avena and Other Mexican Nationals*,³⁴ while urging the Court to annul the trial and conviction of its nationals in the United States in violation of the Vienna Convention on Consular Relations, Mexico analogised its case with the *Arrest Warrant of April 11 2000*,³⁵ and urged the Court to follow suit. In the latter, the Court ordered the cancellation of an arrest

³² Note 19, pp. 45-46

³³ Note 27, p. 721, para 208

³⁴ (*Mexico v. The United States of America*) ICJ Rep 2004, 12, 60 para. 123

³⁵ (*DRC v. Belgium*), ICJ Rep 2002, 3.

warrant issued by a Belgian judicial official in violation of the international immunity of the Congo Minister for Foreign Affairs. In reaching a decision, the Court acknowledged the authority of the *Arrest Warrant case*, but held that it was inapplicable because, in the *Arrest Warrant case*, the legality of the arrest warrant was the subject-matter of the international dispute, hence the proper remedy for finding the warrant in violation of international law was its cancellation. Whereas, in the *Avena case*, it was not the convictions and sentencing of the Mexican nationals which were to be regarded as a violation of international law, but solely certain breaches of treaty obligations which preceded them.

This technique was also employed in relation to the interpretative rule in *Israel v. Bulgaria*³⁶ in two subsequent cases in which the precedent was sought to be applied. The general rule which emanated from *Israel v. Bulgaria* was that the transitional provisions in article 36(5)³⁷ of the Statute of the Court did not preserve jurisdictional instruments made by States which were not original members of the United Nations. And not being an original member, the Court held that Bulgaria could not renew its PCIJ Declaration of acceptance of compulsory jurisdiction under the Statute of the ICJ. Therefore, the Court concluded that Bulgaria had no access to the ICJ under the optional clause system without making a fresh declaration.

Two years later, the Court was invited to apply this precedent in *Temple of Preah Vihear*.³⁸ This case equally called for the interpretation of article 36(5) of the Statute of the Court. Thailand constructed the general legal premise in *Israel v. Bulgaria* to be that: declarations accepting the compulsory jurisdiction of the PCIJ by States which were not original members of the UN lapsed on the dissolution of the PCIJ and could not be renewed under the ICJ Statute when such States joined the UN subsequently. Thailand urged the Court to adopt this precedent to the effect that her declaration equally lapsed within the intervening period

³⁶ *Aerial Incident of July 27th 1955, Preliminary Objections*, ICJ Rep 1955, 127

³⁷ By which PICJ Declarations which are still in force are deemed to be acceptance of the compulsory jurisdiction of the ICJ.

³⁸ (*Cambodia v. Thailand*) Preliminary Objections, ICJ Rep, 1961, 17

between the demise of the PCIJ and when she joined the UN, as did that of Bulgaria. While refusing to apply the Bulgaria precedent, the Court held that the facts of the cases were not sufficiently analogous. The Court found the distinguishing facts in Thailand's subsequent renewal of her otherwise lapsed 1929 PCIJ Declaration, after becoming a member of the United Nations. The Court considered that this fact placed Thailand in a different position to Bulgaria, which did not take any such step.

Subsequently, the Court was again confronted with this precedent in *Barcelona Traction, Light and Power Company Ltd.*³⁹ Here, like Thailand, Spain had based herself on the Bulgaria precedent to urge the Court to hold that the dissolution of the PCIJ extinguished the jurisdictional clause contained in the Hispano-Belgian Treaty of 1927. That as a result, the jurisdictional clause referring disputes to the PCIJ was not transferrable to the ICJ under virtue of article 37.⁴⁰ The Court also distinguished the cases.

The Court found that different instruments were involved in the cases; and that while *Israel v. Bulgaria* involved unilateral declaration under article 36(5), the *Barcelona Traction case* involved an instrument having a conventional form, and having the essential requirement of being "in force" under article 37. Based on these differences, the Court held that the rule adopted in *Israel v. Bulgaria* was inapplicable.

Though these cases clearly show the entrenched nature of the distinguishing technique in the practice of the Court, it is really doubtful whether the best option was for the Court to distinguish the *Bulgaria case* in the subsequent cases, particularly in the *Temple of Preah case*. This is because the cases were not satisfactorily distinguishable. No doubt, there were some factual dissimilarities, these dissimilarities seemed not to justify the inapplicability of the *Bulgaria case* to the subsequent cases. The best option for the Court would have been to overrule the *Bulgaria precedent* given the fact that the existence of the precedent constrained

³⁹ *Preliminary Objections*, 1964 ICJ Rep. .6

⁴⁰ By which the ICJ was substituted for the PCIJ for the purpose of jurisdictional clauses in treaties in force.

the options open to the Court. As noted by the Court, the precedent was capable of causing hardship and creating unintended consequences for States which, even though they were not original members of the UN, intended to transfer their instruments of acceptance of the jurisdiction of the PCIJ to the ICJ. According to the Court:

any decision of the Court, relative to Article 37, must affect a considerable number of surviving treaties and conventions providing for recourse to the Permanent Court It is thus clear that the decision of the Court in the present case, whatever it might be, would be liable to have far-reaching effects.⁴¹

In the *Temple of Preah* case, for instance, the legal ground on which the 1950 purported renewal of her declaration stood is unclear. This is because following the precedent in the *Bulgaria* case, as retained by the Court, the 1929 Thailand Declaration should have been extinguished between the dissolution of the PCIJ and 1946, when Thailand joined the United Nations. That being the case, Thailand had nothing to renew. This point was strongly made in individual opinions of the Judges, who rejected the grounds upon which the Court distinguished the cases.⁴²

If the Court overruled the *Bulgaria precedent*, it would have been spared the lengthy but unsatisfactory distinguishing while trying to justify the grounds of its decision in the subsequent cases. Notwithstanding, the cases do show that the Court would not mechanically follow a precedent, though it would not lightly refuse to follow precedent. The cases do also emphasise the fact that the Court is regrettably swayed from following its earlier decision by extra-legal considerations. The reason for not following the *Bulgaria precedent* may not be related to its tenability as much as it was, on the admission of the Court, related to the fact that it was capable of defeating a considerable number of treaties providing for recourse to the Court. In other words, the Court was more concerned with the impact its decision would

⁴¹ Note 39, p. 29

⁴² See *Separate Opinion of Judge Tanaka in Temple of Preah case*, note 38, p. 65 and the *Dissenting Opinion of Armand-Ugon*, note 38, p. 116

have on the instruments of pacific settlement of disputes at large than its effects on particular disputants.

4.3.2 Overruling a Precedent

The possibility of the ICJ overruling itself is of particular importance to this work because the fact that the Court could overrule itself is surprisingly one of the fulcrums for the argument that judicial decisions are not a source of law. In the opinion of Bernhardt:

International law does not recognise a binding force of precedents or the principle of *stare decisis*, nor is a court decision, even a decision of the world court, a source of international law.... Decisions binding on the parties in the particular case could be overruled the next day by the same court in a new case.⁴³

It is true that the Court can overrule a precedent sooner than it was set. Though the Court is yet to do this, it must nonetheless be considered that the Court, as a first and final Court, is well able to do this. Even if it were to operate within a common law jurisdiction, its ability to overrule its precedent just after it was set would not detract from its general common law character; neither will it affect the authority of the precedent that has not been overruled.

As earlier stated, the question as to whether a particular precedent is binding is a relative question before the court that set that precedent. Law – whether made by the legislature or the judge – is not static and not absolute; there is always the need for reviews so as to keep pace with unforeseen eventualities. This is particularly true of international law, which though it is in need of constant evolution, is lacking in a legislative institution that would give expression to the needed evolution. In the words of Judge Shahabuddeen, in his Separate Opinion in *Certain Phosphate case*,

⁴³ Rudolf Bernhardt, “Article 59’ in the Statute of the International Court of Justice: A Commentary”. Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm ed., *the Statute of the International Court of justice: Commentary*, 1231, 1244 (Oxford University Press: Oxford 2006). This is unconvincing. It is more like saying that rules in judicial decisions must be iron-cast for there to be a system of judicial precedent, whereas not even the common law of England could afford that. It reminds us of the observation that it is “revolting if the grounds upon which it [a precedent] was laid down have vanished long since, and the rule simply persists from blind imitation of the past” – Oliver Wendell Holmes, Jr., “The Path of Law”, 10 Harv. L. Rev. 457 (1897)

The possibility of a court deciding differently on the same issues in differently constituted proceedings is not a phenomenon less known to the law than the general propensity of courts to be guided by their rulings in similar cases. To use the propensity to be guided by previous rulings to exclude the possibility of deciding differently in a later case would be even less right in international litigation than it would be in municipal.⁴⁴

It is therefore important that the ICJ, whose jurisdiction is international and voluntary, should apply much more flexibility than municipal courts.

The ICJ thus has the prerogative to decide to follow a precedent; distinguish a precedent or out-rightly overrule it. Within the common law system, distinguishing is a device used by all courts within the hierarchy of courts. On the contrary, the power to overrule a precedent set by the highest court within the system is the exclusive preserve of that court. As already stated above, these powers are concentrated in the ICJ which is a court of first and final instances.

It is within the powers of the ICJ to overrule a precedent which no longer serves the ends of justice; or when the grounds upon which the precedent was based have “lost legal credibility”.⁴⁵ The Court’s power in this regards was affirmed by Judge Tanaka, when he declared:

...the requirement of the consistency of jurisprudence is never absolute. It cannot be maintained at the sacrifice of the requirements of justice and reason. The Court should not hesitate to overrule the precedents and should not be too preoccupied with the authority of its past decisions. The formal authority of the Court's decision must not be maintained to the detriment of its substantive authority.⁴⁶

An overruled precedent is akin to a repealed legislative enactment; an overruled precedent ceases to have any legal authority in the reasoning process of a Court. And when a precedent is overruled it is not the actual decision in the precedent but the rule/principle of law

⁴⁴ (*Nauru v. Australia*), *Preliminary Objections*, ICJ Reps 1992, 261, 298

⁴⁵ *Joint Declaration of Vice President Renjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby in Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, *Preliminary Objections*, ICJ Rep 2004, 1307, 1356, para 12

⁴⁶ *Separate Opinion, Barcelona Traction*, note 39, p. 65

formulated in reaching that decision that is overruled. The decision continues to have effect between the parties. As a corollary, it does not follow that all disputes touching on rules/principles adopted by the Court concerning a subject-matter are predetermined by virtue of that rule/principle. Though it could be supposed that the Court would reach a similar conclusion in analogical cases, no State can claim victory until the Court actually decides on her own case. This is because the Court may distinguish the precedent or out-rightly overrule the rule/principle it contains.

What the Court should not do is to overrule or ignore a precedent which is still sound in law because the precedent is not conducive to prevailing political trends. The fact that a precedent has led to a politically undesirable result does not necessarily mean that precedent is legally wrong. There are a number of cases in which this has occurred but the writer shall only emphasise the *Status of Eastern Carelia*.⁴⁷ Here, the PCIJ established the rule that the Court should refuse to render an advisory opinion, when: (a) the advisory opinion being sought directly pertained to a dispute between States; and (b) when a party to the dispute refuses to consent to the proceedings.

In the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*,⁴⁸ the advisory opinion requested from the Court was caught by the *Eastern Carelia* rule. The attention of the Court was called not only to the rule, but also the striking similarities between both cases. The cases were similar on the following facts: (a) the subject-matter of both requests was the interpretation of a treaty and the existence of certain international obligations arising under that treaty; (b) in both cases, one of the parties to the dispute refused to take part in the debates in the international organization which subsequently requested the opinion; (c) in both cases, one of the parties was not a member of the requesting international Organization;

⁴⁷ PCIJ Series B. No. 5, Advisory Opinion of July 23, 1923

⁴⁸ *First Phase*, Advisory Opinion, ICJ Rep 1950, 65, 72

and (d) one of the parties to the dispute contested the right of the Court to give an opinion in the case without its consent.⁴⁹

These similarities made it logically imprudent to distinguish the cases on their facts. This presented the Court with the limited options to either follow or overrule *Eastern Caralia*. Technically overruling *Eastern Caralia*, (without explicitly stating so) the Court set a new rule that, advisory opinions, even if related to a legal question actually pending between States, did not require the consent of interested States. The Court declared that no State, whether a Member of the United Nations or not, can prevent the giving of an advisory opinion which the United Nations considers to be desirable in order to obtain enlightenment as to the course of action it should take, as the Court's opinion is given, not to the States, but to the organ which is entitled to request it.⁵⁰

When the issue arose again in *Western Sahara*,⁵¹ the Court leaned heavily on *Peace Treaties* while seeking to rationalise the conflict between *Eastern Carelia* and *Peace Treaties* by balancing the requirement of consent on judicial propriety. In the view of the Court, the competence to give an opinion does not depend on the consent of the interested States (even when the request concerns a legal dispute actually pending between States), except the absence of consent makes it judicially inappropriate to render the opinion.⁵²

When considered in the light of the in-excludable rule of international law that a State is not obliged to allow its disputes to be submitted to judicial settlement without its consent (on which the PCIJ based itself), it becomes clear that *Eastern Carelia* best articulates the law, since it is from this fundamental principle of law that *Eastern Carelia* draws its juridical strength.⁵³ This, perhaps, explains why despite attempting to overrule the case, it has

⁴⁹ See the Dissenting Opinion of Judge Zoricic in *Interpretation of Peace Treaties*, *ibid*, p 103

⁵⁰ *Interpretation of Peace Treaties*, note 48, p. 71

⁵¹ *Advisory Opinion*, ICJ Rep 1975, 12

⁵² *Ibid*, p 24, para 32-34

⁵³ See Judge Zoricic, Note 49, p., 104 (affirming that “the principle of sovereign equality and the rule of law which follows from it and which was applied in *Eastern Carelia* have lost nothing of their value”). Also, the Judge affirmed that *Eastern*

continued to be relevant. Its relevance was even affirmed, both in the *Peace Treaties* itself and *Western Sahara*. In both cases, the Court still distinguished *Eastern Carelia*. This is not an attitude of a Court that thought the rule in a particular precedent was wrong and should be overruled, no matter how subtly. Such a Court does not have any legal obligation to resurrect the precedent for the purpose of distinguishing the case at hand. By that singular act, the Court affirmed the tenacity of the *Eastern Carelia*.

This, no doubt, is an instance of the Court avoiding its precedent for considerations other than the correctness of the rule it upholds. It may well be that the avoidance of *Eastern Carelia* was because it became a ground for urging the Court to decline rendering opinion by recalcitrant States seeking to shield a matter from the scrutiny of the law. For instance, Spain had sought to shield the legal scrutiny of the colonisation of Western Sahara from the law by relying on *Eastern Carelia*. Same did South Africa in respect of her continued presence in Namibia, in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*.⁵⁴ These areas being matters of great moment in international affairs and touching on the sensitivities of newly independent States (at that time) and on a cardinal purpose of the UN, the Court may have acted on political expediency. Whether the Court should act on such expediency is another question all together. And this can by no means question the legal validity of the legal premise upon which *Eastern Carelia* was constructed.

On the other hand, it is equally undesirable to allow a wrong precedent to continue by using the avoidance technique of distinguishing. To allow this to happen is to invite further litigations on the point decided by that precedent. It is, therefore, incumbent on a court, having the power to do so, to overrule a wrong precedent and forestall every possibility of its resurrection in future cases. It is indeed the failure of the Court to overrule *Israel v. Bulgaria*

Caralia is “a precedent of the highest importance”.(p. 102)

⁵⁴ ICJ Rep 1971, 16 , 23 para 31

rule, though it had been a major obstacle to independent reasoning in the *Temple of Preah case* and the *Barcelona Traction case*,⁵⁵ that informed objections being raised concerning the continued relevance of that precedent in *Military and Paramilitary Activities in and Against Nicaragua*.⁵⁶

In the latter case, the Court once again sailed into the province of the rule in *Israel v. Bulgaria*, when it was argued by the United States that Nicaragua was caught by *Israel v. Bulgaria*. It was argued that Nicaragua had no valid declaration accepting the jurisdiction of the PCIJ capable of transiting to the jurisdiction of the ICJ by virtue of article 36(5). This was because Nicaragua's PCIJ Declaration was never ratified. The legal equation was as follows: if Nicaragua had a valid PCIJ Declaration, being an original member of the UN, its case would seamlessly fall within the principle in *Bulgaria v. Israel*. Since the sole reason that made the Bulgaria declaration non-transferable was the fact that she was not an original member of the UN, it would indirectly flow from that precedent that the declaration of an original member of the UN is automatically transferred to the ICJ. However, absent a valid declaration, one of the conditions for the application of the principle in the *Bulgaria case* would not have been fulfilled.

The Court was now sandwiched between its desire not to radically upset its earlier case-law on the point, and its desire not to unduly restrict its jurisdiction. The only way out was for the Court to, once again, distinguish *Israel v. Bulgaria*.⁵⁷ But the lengthy distinguishing would have been avoided had the case been overruled in the preceding cases.

Expectedly it was *Israel v. Bulgaria* that furnished the impetus for the strong dissenting opinions of Judges Jennings and Schwebel. Judge Schwebel reasoned that the *Bulgaria case* strikingly and decisively nullified Nicaragua's Declaration in that if, as held in the *Bulgaria*

⁵⁵ All of which have been discussed in pages 136-137, above

⁵⁶ (*Nicaragua v. the United States of America*), *Jurisdiction and Admissibility*, ICJ Rep 1984, 392

⁵⁷ *Ibid*, p. 405

case, the purpose of article 36, paragraph 5, is to transform acceptance of the compulsory jurisdiction of the PCIJ into an acceptance of that of the ICJ, it would exclude States like Nicaragua which never accepted the PCIJ compulsory jurisdiction.⁵⁸ In the reasoning of Judge Schwebel,

... today's [*Nicaragua case*] Judgment, while endeavouring to distinguish the facts at bar in the *Aerial Incident* case from the instant case, renews ... its reliance upon the Judgment in the *Aerial Incident* case and so gives fresh point to this question.⁵⁹

Judge Jennings followed the same line of reasoning. In effect, his reasoning was that, if following *Israel v. Bulgaria*, a declaration which had come into effect for the PCIJ, and was still running, was not transferrable under Article 36(5), due to the dissolution of the PCIJ, it would have by similar logic occurred that a declaration which never actually created an obligation in respect of the PCIJ, cannot be carried over to the ICJ by Article 36(5).⁶⁰

It is thus not conducive to the maintenance of coherence and promotion of the rule of law for the Court to suppress rather than overrule an ailing precedent; or for it to refuse to follow a sound precedent for reasons other than its tenability.

4.3.2.1 The Court does not make a Habit of Overruling its Precedent

It is obvious from the cases that the Court does not make a habit of overruling its precedent. Even in cases where the Court faced strong criticisms from some of its Judges and some scholars, the Court maintains the precedent sought to be discredited. The precedent in the *Right of Passage over Indian Territory*⁶¹ provides a cogent example. Here, the Court held that the transmission of the declaration of a new Declarant to existing Declarants under article 36(4) was not a pre-requisite to the right of the new Declarant to bring proceedings against an

⁵⁸ *Dissenting, ibid*, p 579 para 28

⁵⁹ *Ibid*, p. 581, para., 30

⁶⁰ *Separate Opinion, Ibid*, p. 539

⁶¹ (*Portugal v. Indian*), *Preliminary Objections*, ICJ Rep 1957, 125

existing member under the optional clause system. When the question as to whether a new Declarant can seize the Court with a case against an existing Declarant before her Declaration is transmitted, arose again in *Cameroon v. Nigeria*,⁶² the case became dependent on the application or otherwise of the *Right of Passage case*. Nigeria specifically invited the Court to overrule the case and hold that non-transmission was mandatory under article 36(4). The Court declined the invitation, affirming that there was no reason not to follow the reasoning and conclusion in the *Right of Passage case*.

This judgment was criticised in the individual opinions of some of the Judges. Judge Koroma criticised the failure of the “Court ... [to] grasp the opportunity which the case presented, as well as the circumstances surrounding it, to carry out a juristic as well as a judicial reappraisal of Article 36 of the Statute”.⁶³ The Judge queried why the Court would refuse to reconsider the *Right of Passage* decision which, “not only was rendered more than 40 years ago but has been the subject of repeated calls for reconsideration”,⁶⁴ affirming that “it would have been more than timely for the Court to undertake a reappraisal both of the provision of the Statute and the Judgment itself”.⁶⁵ On his part, Judge Weeramantry thought the *Right of Passage* decision was in need of a review as “It affects too fundamental an aspect of the Court's jurisdiction to remain as the leading authority on this question after 40 years of development of international law”.⁶⁶

This has also been the situation with the rule adopted by the Court in *Military and Paramilitary Activities in and against Nicaragua*,⁶⁷ concerning the scope of “armed attack” under article 51 of the Charter of the United Nations. Here, the Court held that military action by irregulars could constitute armed attack only if they were sent by a State or they were

⁶² Note 13

⁶³ Dissenting in *ibid*, p. 379

⁶⁴ *Ibid*

⁶⁵ *Ibid*

⁶⁶ *Dissenting, in ibid*, p. 363

⁶⁷ Note 24, p 103 para 195

acting on behalf of a State. A view which was approved and followed in the Advisory Opinion in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*⁶⁸ and *DRC v. Uganda*,⁶⁹ despite calls by litigating States and even by judges of the Court, that the Court should reconsider the rule in the light of the development of international law on the subject.

In urging the Court to review its *Nicaragua* precedent, Judge Kooljmans reasoned that the Security Council had introduced a new element which recognises that “armed attack” could proceed from non-State actors by virtue of Resolutions 1368 and 1373 (2001), and urged the Court to follow suit, notwithstanding that the *Nicaragua case* position had been the generally accepted interpretation for more than 50 years.⁷⁰ The Judge regretted that the Court “bypassed this new element ...which marks ... a new approach to the concept of self-defence”.⁷¹ Judge Higgins also disagreed with the majority though accepting that the view of the majority was the law until set aside.⁷² Judge Kooljmans remarked that the Court had lost an opportunity to take a position with regard to the question whether the threshold set out in the *Nicaragua* judgment was still in conformity with contemporary international law in spite of the fact that that threshold had been subjected to increasing severe criticism ever since it was established, and in spite of the explicit invitation by one of the parties to do so.⁷³ On his part, Judge Simma reasoned that the Court ought urgently to reconsider the precedent in the light of more recent developments not only in State practice, but also with regard to accompanying *opinio juris*.⁷⁴

⁶⁸ ICJ Rep 2004, 136

⁶⁹ Note 23

⁷⁰ Separate Opinion in the *Wall Opinion* note 68, p. 230, para 35

⁷¹ *Ibid*

⁷² Separate Opinion in *ibid*, p. 215, para 33

⁷³ Separate Opinion in *DRC v. Uganda*, note, 23, p. 313, para 25 and p. 315-316, para 35

⁷⁴ Separate Opinion in *ibid*, 337, para 11

These cases demonstrate the unwillingness of the Court to alter its precedent once set. While lending credence to the fact that the Court attaches juridical relevance to its precedent, it equally portrays a situation capable of stultifying the development of international law.

The last few sections above have discussed the techniques employed by the Court towards systematic application of precedent. It has been said that the Court uses the distinguishing technique and also that it has the power to overrule a precedent which it considers no longer tenable in law. It has also been shown that the Court is reluctant to overrule a precedent, thus leading to a situation where the Court repeatedly entertains arguments on the authority of a precedent that it should have overruled at the earliest opportunity. This has resulted in the Court laying down conflicting decisions on the same issue.

4.3.3 Conflicting Decisions

The writer has shown above that there are two conflicting rules guiding the advisory jurisdiction of the Court concerning a legal question bearing on a dispute between States, one of which is not a member of the UN and has not given its consent to the proceedings. Thus while *Eastern Carelia* established that the Court should refuse to render an opinion in the circumstances, the *Peace Treaties case* established that the consent of an interested State is not a pre-requisite, even if the State is not a member of the UN.

The approach of the Court in these cases is untidy. By continuing to recognise the validity of the *Eastern Carelia* precedent⁷⁵ while taking a completely different view in the *Peace Treaties*⁷⁶ and *Western Sahara*,⁷⁷ the Court maintained two conflicting precedents on the point, thus unsettling that area of its case-law and impeding consistency and predictability. This was manifest in the *Western Sahara case*, where in summing up the arguments of the Parties, the Court noted:

⁷⁵ Note 47

⁷⁶ Note 48

⁷⁷ Note 51

In support of these propositions Spain ... has relied, in particular, on ... the *Status of Eastern Carelia* case ... maintaining that the essential principle enunciated in that case is not modified by the decisions of the present Court in ... the *Interpretation of Peace Treaties* ... and the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)* Morocco and Mauritania, on the other hand, have maintained that the present case falls within the principles applied in those two decisions and that the *ratio decidendi* of the *Status of Eastern Carelia* case is not applicable to it.⁷⁸

In consequence, it would be for a future Court to choose which of the two it prefers to follow until one of them is eventually overruled by the Court or excluded by treaty. Hence the situation where the Court refused to follow *Eastern Carelia* in the *Peace Treaties* and *Western Sahara*, while the *Namibia* opinion,⁷⁹ which was rendered between *Eastern Carelia* and *Peace Treaties*, did not even attempt to challenge the tenacity of *Eastern Carelia*. In the latter, the Court still accepted the validity of *Eastern Carelia* though distinguishing it, while the *Peace Treaties*, which became authority for the decision in *Western Sahara*, was not even cited in the *Namibia* case.

The first⁸⁰ and second⁸¹ *Genocide* cases and the *Use of Force* case,⁸² are in the same stead. The issue common to these cases was the competence of the Federal Republic of Yugoslavia (FRY as Serbia and Montenegro) in the ICJ, following the disintegration of the former Socialist Republic of Yugoslavia (SFRY).

In the decision on preliminary objections in the first *Genocide* case,⁸³ the Court held that FRY was a competent Respondent, on the strength of article 35(1) of the Statute of the Court and article IX of the Genocide Convention. This decision was generally predicated upon an

⁷⁸ *Ibid*, p., 23, para 28

⁷⁹ Note 54

⁸⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep 2007, 43

⁸¹ Note 4

⁸² Note 45

⁸³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia) Preliminary Objections*, ICJ Reports 1996, 595

earlier Ruling of the Court⁸⁴ that FRY was a continuator of the Socialist Federal Republic of Yugoslavia (SFRY) and thus had access to it under article 35(1) of its Statute and the Genocide Convention. Subsequent to the decision of the Court, events at the UN General Assembly and Security Council revealed that FRY was not competent to participate in the activities of the UN as a continuator of the former SFRY. FRY was, therefore, declared a non-member of the UN, and was subsequently admitted to membership of the UN on November 1, 2000, upon a fresh application.

In consequence, FRY filed an Application for revision of the Judgment of July 11, 1996.⁸⁵ FRY contended that her admission into the UN after the 1996 Judgment negated the ground upon which that Judgment was based. And that not being a member of the UN, she was not a party to the Statute of the Court, neither was she bound by the Genocide Convention. In its judgment, the Court declared the application for revision inadmissible and declined comments on the issues concerning access to Court raised by FRY.⁸⁶

Before judgment on the merit was delivered in the first *Genocide case*, the issue of the access of FRY to the Court either as a member of the United Nations or as a party to the Genocide Convention fell to be decided again. In the *Use of Force case*,⁸⁷ the Court held that, whatever title of jurisdiction FRY (*Serbia and Montenegro*) might have invoked, she did not have access to the Court under article 35(1) of its Statute when the application was filed because she was not a member of the UN. As for article IX of the *Genocide Convention*, the Court held that the Convention could not be a basis of jurisdiction because the Convention was not

⁸⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures*, ICJ Rep 1993, 3, 14, para 19

⁸⁵ *Application for Revision of the Judgment of July 11 1996 in the Application of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections (Yugoslavia v. Bosnia and Herzegovina)*, ICJ Rep 2003, 7

⁸⁶ This approach did not find favour with a number of the Judges. See *Separate Opinion of Judge Koroma*, in *ibid*, p. 38 para 11 (holding that the fact of the admission of FRY into the United Nations had legal implications for the earlier decisions of the Court); *Judge Vereshchetin*, dissenting, *ibid*, p. 50 para 28 (holding that the application was meritorious in view of the fact of admission); *Declaration of Judge Rezek*, *ibid*, p. 51 (holding that subsequent events at the UN imply that the entity over which the Court assumed jurisdiction in 1996 could not, at that time, claim to have been a member of the UN and a Party to either the Statute of the Court or the Genocide Convention.).

⁸⁷ Note 45

a treaty in force within the contemplation of article 35(2) of the Statute of the Court. The Court reasoned that the Convention postdates the Statute of the Court and that article 35(2) only relates to treaties which were in force at the time the Statute came into being.

It is obvious that the decision of the Court in this case is in conflict with its earlier decision in the *first Genocide case* on the issue of the access of Yugoslavia to the Court. It is also noteworthy that the Court in the *Use of Force case*,⁸⁸ had, in its ruling delivered before FRY was admitted into the UN in 2000, followed the position in the *first Genocide case*. To justify its departure from the *first Genocide* precedent, the Court stated that the new approach was informed by the vantage point from which it “now looks at the legal situation ... in the light of the legal consequences of the new development since 1 November 2000”.⁸⁹ In clear terms, and rightly too, the Court predicated its departure from its earlier position on the admission of FRY into the UN.

4.3.3.1 Implications for the Genocide Cases

At this point the bases for the Court’s jurisdiction in the *first Genocide case* had been overruled. The clear position of the law became that FRY was not competent before the Court either as an applicant or a respondent before it was admitted into the UN in 2000. The implication of this was that the *first Genocide case*, which was filed before that date and was still pending, was not competent. Expectedly, at the merit stage of the *first Genocide case*, Yugoslavia drew the attention of the Court to the decision in *the Use of Force cases*, and asked the Court to decline jurisdiction since it was now judicially confirmed that she did not have access to the Court as at March 20, 1993, when the case was filed. The Court rejected the objection affirming that it had jurisdiction, on the basis of Article IX of the Genocide

⁸⁸ See *Legality of the Use of Force (Yugoslavia v. Belgium) Provisional Measures*, ICJ Rep 1996, 124

⁸⁹ Note 45, p 1338, para 77

Convention. It was from this point that the case-law of the Court became destabilised concerning the competence of FRY before the Court.

The problem which confronted the Court was how to reconcile this decision with the *Use of Force case*, which incidentally involved FRY as Applicant while a Respondent in the first *Genocide case*. The Court had the more judicially prudent choice of following the *Use of Force case* at the pains of being denied the opportunity of examining the grave allegations of genocide raised against FRY.⁹⁰ Otherwise the Court could distinguish or overrule the *Use of Force cases*. Rather, the Court allowed itself to set two conflicting precedents on a question of law and facts involving the same State party to the two cases. What is particularly worrisome is the failure of the Court to address the implications of the *Use of Force* precedent with a view to justifying its excludability. The Court was content to follow *res judicata*. What could be *res judicata*, in an issue that intrinsically affected the competence of the Court (which jurisdiction is consensual) over a State that was not in the position to give the requisite consent?

The implication of the manner the Court handled its precedent in the *first Genocide case*, was that FRY had competence to be brought to the Court as a Respondent at the suit of another State, but lacked the competence to sue as an Applicant. These inconsistent results did not only question the judicial propriety of the *first Genocide decision*, it also undermined the sovereign equality of FRY *visa a vis* other States.

When the question arose again in the *second Genocide case*,⁹¹ the Court was faced with two conflicting decisions on the issue. Instead of boldly addressing this conflict, the Court chose another reason altogether; it simply relied on what it constantly called “the *Mavrommatis*

⁹⁰ This is again, the interplay between judicial consistency and international public policy. It would appear from the totality of the case, that the Court placed its desire to adjudicate the Genocide Convention above the consideration of consistency.

⁹¹ Note 4

doctrine".⁹² This *doctrine* is to the effect that, any defect in the jurisdiction of the Court arising from the non fulfilment of a condition when the case was filed, would be retrospectively cured when the condition is fulfilled before the Court decides on its jurisdiction.⁹³ It is, as rightly pointed out by Judge Skotnikov, doubtful whether the *Mavrommatis doctrine* was applicable to this case. The Judge thought, and rightly too, that *Mavrommatis* and all the other cases cited by the Court pertained to "consent", as against the "right" to appear before the Court, which was in issue at the second *Genocide* case.⁹⁴

By necessary implication, the *second Genocide* Court technically agreed that there was a defect arising from the status of FRY, but that the defect was cured by the *Mavrommatis doctrine*. The approach of the Court is all the more confounding because Croatia had expressly invited the Court to "reconsider and modify the interpretation..." adopted in the *Use of Force* case, (regarding the view that the Genocide Convention was not a treaty in force for the purpose of article 35(2) of the Statute of the Court) and correct the error.⁹⁵ This is even more so, given that the Court acknowledged the authority of its previous decisions, when noting that some of the facts and the legal issues dealt with in the *first Genocide case* and the *Use of Force case* arise also in the present case, The Court declared:

To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so.⁹⁶

However, just like in the *first Genocide case*, the Court was evasive. It failed to resolve the conflicting precedents handed down by the *first Genocide case* and the *Use of Force case*.

⁹² *Ibid*, p. 440, para 84

⁹³ *Mavrommatis Palestine Concession*, Judgment No. 2, 1924, PCIJ., series A, No. 2, p. 34.

⁹⁴ Dissenting, note 4, p 546, para 1; Also see Judge Owada, dissenting, p. 501, para 9-11. For the cases see pp. 438-439

⁹⁵ Note 4, pp. 431-432, para 64 and pp. 435, para 71. Even, Judges Skotnikov (*ibid*) and Owada (p. 496, para 2), drew the attention of the majority to the fact that the Court had held that the Genocide Convention was not a treaty in force in the *Use of Force* cases.

⁹⁶ Note 4, p. 428 para. 53

Quite rightly, the failure of the Court to effectively deal with the *Use of Force precedent* was one of the grounds on which a number of Judges based their dissents. In the joint dissenting opinion of Judges Ranjeva, Shi and Koroma in the *first Genocide case*, the Judges remarked that the Court employed diversionary tactics by which it failed to exhaustively discuss the basis of its jurisdiction and provide reasoned examination as required by article 56 of its Statute.⁹⁷ They further contended that it was regrettable that the Court chose to depart from its own jurisprudence.⁹⁸ In his Separate Opinion, Judge Tomka was not convinced with the “strained reasoning”⁹⁹ of the majority in the *first Genocide case*. Judge Al-Khasawneh thought the Court in the *first Genocide case* was wrong for failing to address the contradictions between its earlier decisions and the *use of Force case*.¹⁰⁰

The views expressed in the dissenting opinion of the judges truly captured the essence of the duty of the Court to maintain coherence by either following or clearly overruling a precedent. Rather than allowing the two conflicting precedents on a particular issue to exist concurrently.

No doubt, the upheaval in the case-law of the Court concerning advisory opinions relating to matters pending between States and the particular question of the competence of FRY before the Court could have been avoided. It was open to the Court to either follow or overrule the precedents, rather than allowing them to continue while reaching a contrary position without distinguishing or overruling the conflicting precedent. The ICJ cannot afford to reason in a haphazard manner. It must act in a manner reflecting its judicial character, whenever it chooses to modify its earlier position.¹⁰¹ The Court is not entitled to pick and choose reasons

⁹⁷ Note 80, p.267 para 3

⁹⁸ *Ibid*, p.274 para 17

⁹⁹ *Ibid*, p. 322, para 21

¹⁰⁰ Dissenting in note 4, p. 249 Para 16

¹⁰¹ C. Wilfred Jenks, “The Prospects of International Adjudication”, 101 (1964) cited in Leo Gros, “The International Court of Justice: Consideration of Requirements for Enhancing its Role in the International Legal Order” 65 Am. J. Int’l L. 253,

for its decisions, especially where the cases are inter-related. Once again, the emasculating effects of politics and international public policy on this problem cannot be ignored.

It has so far been shown that the Court follows its precedent. Also, that though the Court is not bound by the English rule of *stare decisis*, it seldom departs from its precedent even in cases where it was strenuously urged to do so. It has been noted that the Court reasons by analogy, using the distinguishing technique to set cases apart when their facts are not analogous. The writer has also questioned the propriety of handing down conflicting precedents on the same issue while, at the same time not ignoring extra-legal factors that may account for this.

The question the writer shall now address is the juridical relevance of the precedent of the Court given that *stare decisis* is inapplicable in the Court. In other words, of what use are the precedents of the Court absent *stare decisis*, which plays a vital role under the common law?

4.4 Adherence to Precedent Guarantees Coherence

The undeniable relevance of adherence to precedents by the Court is coherency. In simple terms the connectivity between a precedent and a case at hand is analogical reasoning. Through analogy the Court treats like cases alike to the effect that States in similar factual positions are treated alike through the application of the same legal rules/principles. This is irrespective of whether or not any of the litigating States was not a party to the case in which the rules/principles were adopted. What connects two otherwise unconnected States; unconnected cases; and unconnected but analogous causes of action, is the common rules/principles applicable to them. By analogical reasoning, a precedent, no matter how remote in time and space, becomes relevant if not decisive to the decision in a later case. It thus becomes possible to be certain about how a court that follows its precedent would decide

253 (1971) (stressing the essence of confidence in the “stability and adequacy of the law”, and “in the integrity and predictability of courts and tribunals administering justice”.)

a similar factual situation to one it had previously decided. This ensures coherence, checks arbitrariness and promotes equality of treatment as well as the rule of law. As one writer puts it, respect for precedent “serves to take the capricious element out of the law and to give stability to a society”.¹⁰²

The importance of coherence in the decisions of the ICJ cannot be overemphasised in view of the fact that the States, which are the main litigants before the Court, operate under the illusion that they are equal; and legitimately expect the Court to perpetuate this notion of equality through consistency of reasoning and decisions, and to provide sufficiency of reasons for acting otherwise.¹⁰³ For Judge Schwebel, equality of treatment can come only with “... the most careful regard for its precedents”.¹⁰⁴ And, declaring that “[c]onsistency is the essence of legal reasoning”,¹⁰⁵ Judge Koojamas pointed out that “consistency in reasoning in the Court’s case law is of paramount importance...”.¹⁰⁶

This, perhaps, explains why the practice of following its precedent is often defended and rationalised in the judgments and opinions of the Court as well as in the opinions of individual judges. In his *Separate Opinion in Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judge Schwebel was of the view that “[w]hile the Court may be commended for the simplicity of its conclusion, a principled consistency with its earlier case-law is less conspicuous”.¹⁰⁷ This, according to the Judge, was because the majority had jettisoned “what its case-law, and the accepted customary law of the question, have provided”.¹⁰⁸ In his Dissenting Opinion in the *second Genocide case, ad hoc* Judge Kreca reasoned that “judicial consistency is rather the result, the picture of the coherency of

¹⁰² William Douglas, “Stare Decisis”, 49 Colum. L. Rev. 735, 736 (1949)

¹⁰³ *Judgments of the Administrative Tribunal of the I.L.O., Advisory Opinion*, ICJ Rep, 1956, 77, 86 (holding that “the principle of equality of parties follows from the requirements of good administration of justice”.)

¹⁰⁴ S. M Schwebel, “Reflections On the Role of the International Court of Justice” 61 Wash. L. Rev 1061, 1068 (1986)

¹⁰⁵ *Separate Opinion in Use of Force cases*, note 45, p. 1369 Para 10

¹⁰⁶ *Ibid*

¹⁰⁷ (*Denmark v. Norway*), ICJ Rep 1993, 38, 118

¹⁰⁸ *Ibid*

decisions and the reasons making a logical legal union, based on the proper application of legal rules which should bind any court of law in its judicial activity”. Also, that “judicial consistency “represents the intrinsic, organic quality of the judicial reasoning in the different phases of a case, or different cases, which regard identical or similar issues”.¹⁰⁹ In the *Barcelona Traction case* Judge Tanaka insisted:

the same kind of cases must be decided in the same way and possibly by the same reasoning. This limitation is inherent in the judicial activities as distinct from purely academic activities.¹¹⁰

Coherency of reasoning and predictability of decisions cannot be achieved unless, as explained by Judge Kreca, a given factual state and legal status occurring in two different cases receives equal treatments.¹¹¹ This invariably means that a rule adopted for, or a principle applied to, a given set of facts and circumstances in a previous case should equally be applied to subsequent analogous cases, except there are good reasons dictating otherwise. The Court is not entitled to treat like cases alike as a matter of convenience but as a vital tool for the maintenance of its judicial character and the achievement of coherence. Knowing, as stated by Rosalyn Higgins,¹¹² that “coherence and consistency is the cornerstone of continuing respect for its jurisprudence”,¹¹³ and fully aware that the international community relies on it for the correct position of the law, the Court cannot but attach fundamental importance to coherency.

An incoherent case-law would not only create inequality it would also expose the Court to a perception of being biased and this would in turn erode confidence and trust. For:

¹⁰⁹ Note 4, p. 566, para 22

¹¹⁰ Note 39, p. 65

¹¹¹ Separate Opinion in the first *Genocide Case*, note 80, p 493, para 51

¹¹² Rosalyn Higgins, *Problems and Process. International Law and How We Use It*, (Clarendon Press, Oxford, 1994)

¹¹³ *Ibid*, p. 202

...if like cases are not treated alike, the very essence of a normative system of law will be lost. Should this develop, the legitimacy of international law as a whole will be placed at risk.¹¹⁴

Inconsistent decisions are the direct consequences of disregarding precedent. The line of cases concerning the South West African Mandate would buttress this point. On the question of the Mandate of South West Africa, the Court delivered three opinions – *International Status of South-West Africa*;¹¹⁵ *South-West Africa-Voting Procedure*,¹¹⁶ and *Admissibility of Hearings of Petitioners by the Committee on South West Africa*¹¹⁷ – and two judgments – the preliminary judgment¹¹⁸ and the main judgment¹¹⁹ in the *South West Africa Cases*. In the three Opinions, the Court was consistent in following the view established in the *International Status of South-West Africa*, which was its first Opinion on the issue. The consistent view followed by the Court was that the Mandate system outlived the League of Nations and that the Mandate obligations can be exercised by the United Nations. This was contrary to the argument of South Africa that the Mandate had lapsed since the League had ceased to exist.

When the contentious jurisdiction of the Court was separately seized by Ethiopia and Liberia in *South West Africa Cases*, South Africa resurrected its 1950 argument in the advisory opinion on *International Status of South-West Africa*. She argued, *inter alia*, that the dissolution of the League of Nations had extinguished the right of any member of the League to enforce the terms of the mandate by judicial means.

In its judgment on preliminary objections, the Court recalled that a similar argument was raised by South Africa but dismissed by the Court in its 1950 Advisory Opinion. The Court

¹¹⁴ J.I Charney, “The Impact on the International Legal System of the Growth of International Courts and Tribunals”, 31 N.Y.U.J. Int’l L. & Pol 697, 699 (1999)

¹¹⁵ *Advisory Opinion*, ICJ Rep 1950, 128

¹¹⁶ *Advisory Opinion*, ICJ Rep 1955, 67

¹¹⁷ *Advisory Opinion*, ICJ Rep 1956, 23

¹¹⁸ (*Ethiopia v. South Africa; Liberia v. South Africa*), *Preliminary Objections*, ICJ Rep, 1962, 319

¹¹⁹ (*Ethiopia v. South Africa; Liberia v. South Africa*), 2nd Phase, ICJ Rep 1966, 6

affirmed the continuing tenacity of the view taken in previous line of cases and made it clear that it had no desire to overrule it. It declared:

The unanimous holding of the Court in 1950 on the survival and continuing effect of Article 7 of the Mandate, continues to reflect the Court's opinion today. Nothing has since occurred which would warrant the Court reconsidering it. All important facts were stated or referred to in the proceedings before the Court in 1950.¹²⁰

Following the 1950 Opinion, the Court held that the applicants had *locus standi*, which shall continue to exist and be exercisable in the ICJ for as long as the Respondent continued to exercise the right to administer the territory under the Mandate.¹²¹

This settled view of the Court was overturned in the Second Phase of the same case. Here, the Court, *suo motu*, revised its preliminary judgment and all the other precedents on the point. It held that Ethiopia and Liberia did not have *locus standi* to bring the application, and that it was only the League of Nations that had the right to require the due performance of the Mandate. It held that the right, being exclusive to the League was exercised only through its competent organs.¹²² In direct conflict with its earlier view the Court held that there is “no principle of law which would warrant ... a conclusion”¹²³ that the right previously held by an organisation devolves upon its members when it is dissolved. The Court expressly declared for the first and only time since the time of the PCIJ that its precedent was “not well-founded”.¹²⁴

Needless to recall the difficulties this decision created for the Court. Starting with the Court itself, was its failure to reach a majority decision so that the deadlock had to be broken by the President’s casting-vote. The dissenting Judges criticised the Court on several grounds. In his apt critique, Jessup noted thus:

¹²⁰ Note 118, p. 334

¹²¹ *Ibid*, p., 336-338

¹²² *2nd Phase*, note 121, p. 28-29 para 33-34

¹²³ *Ibid*, p. 35, para 55

¹²⁴ *Ibid*, p. 37, para 60

This is the fifth time the Court has given consideration to legal matters arising out of the administration by the Republic of South Africa of the mandated territory of South West Africa. In the course of three Advisory Opinions rendered in 1950, 1955 and 1956, and in its Judgment of 21 December 1962, the Court never deviated from its conclusion that the Mandate survived the dissolution of the League of Nations and that South West Africa is still a territory subject to the Mandate. By its judgment of today, the Court in effect decides that Applicants have no standing to ask the Court even for a declaration that the territory is still subject to the Mandate.¹²⁵

The problem the Court had was that of inconsistency arising out of the disregard of its precedent. The 1966 judgment took a contrary view to the previous judgments without justifying, by cogent reasoning, its decision to overrule the previous position.

Since consistency is important to the good administration of justice by the Court (having a legal duty to maintain the equality of States) it would necessarily follow that the Court has a duty to maintain coherent precedents.

Coherency should, however, not be taken to the level of rigidity; it is always open to the Court to reconsider its earlier position when the ground it previously chose for the decision has lost legal credibility. This was exactly the situation in the *Legality of the Use of Force case*. Finding that the ground relied upon by the *first Genocide case* had lost tenability, the Court had to reconsider the *first Genocide case*. The inconsistencies between the preliminary rulings in the *first Genocide case* and the *Use of Force case*, is not one that any Court could avoid (without entrenching rigidity), because it was based on a justifiable objective criterion. The inconsistency to be avoided is that arising from a situation where though a future Court is unable to fault the ground upon which a precedent is based, yet disregards the precedent to arrive at an irreconcilable decision on the same subject-matter. This was the problem with the 2007 *first Genocide case* judgment.

¹²⁵ *Dissenting, ibid*, p 327. This is a case that had a strong interplay of politics and law. Expectedly and as observed by Gros, the dissatisfaction with the Judgment was expressed in the criticism of the composition of the Court and its insensitivity to anti-colonial and anti apartheid sentiments – Leo Gros, note 101, p. 267

It is, therefore, difficult to understand why some Judges of the Court blamed *the Use of Force* Court for failing to maintain consistency when, in the circumstances of the case, it was the 2007 *Genocide case* judgment that threw a spanner in the works. For instance, Kooijmans, criticised the *Use of Force* Court for choosing an approach which is not in line with the reasoning in the Court's case-law in the *first Genocide case*.¹²⁶ Similarly, Judge Al-Khasawneh thought "the reasoning followed by the Court "in the *Legality of Use of Force* Judgments", did not "perhaps represent the zenith of legal reasoning... in addition ... to its negative and regrettable impact on the broad consistency of the Court's jurisprudence".¹²⁷

This, in his reasoning, was because *the Use of Force Court* did not hesitate to reverse the position of the *First Genocide Court*, which he thought carried considerable weight and should not have been lightly reversed.¹²⁸ Vice President Renjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby thought the Court was wrong to have ignored the definitive findings in the first *Genocide case*. They thought that the approach of the Court did "not adequately reflect the proper role of the Court as a judicial institution",¹²⁹ because "[t]he Judgment thus goes back on decisions previously adopted by the Court ...".¹³⁰

When viewed in relation to the cogency of facts upon which the *Use of Force Court* based its decision and the logicity of that decision, it would appear that these Judges were ultimately advocating rigidity; any form of consistency that would preclude the Court from overruling a previous position when the ground upon which the decision was based had lost legal credibility (as was the situation with the first genocide case) is unhealthy for the progressive

¹²⁶ *Separate Opinion in the Use of Force*, note 45, p. 1369 Para 10

¹²⁷ *Dissenting, first Genocide case*, note 80 p. 249 para 15

¹²⁸ *Ibid*, p. 250 para 18

¹²⁹ *Joint Declaration of Vice President Renjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby in Use of Force case*, note 45, para 1357 para 13

¹³⁰ *Ibid*

development of the international law.¹³¹ While it is essential to the preservation of its judicial character to ensure consistency of decisions, the Court should be careful not to cross the thin line between consistency and rigidity. As done in the *Use of Force cases*, the Court should boldly reconsider its previous position when the situation calls for it.

On the whole, this section strengthens the point that judicial decisions are a source of international law: the ultimate result being that judicial coherency builds the law in the continental system and more so the common-law system. Through consistency of reasoning, points of law previously established become settled. And from its settled jurisprudence, “the Court departs only if ... there are very particular reasons to do so”.¹³² Hence, as stated by James Scott in 1934, the jurisprudence of the international Court forms a continuous body of law applicable to the relations of States and constitutes a repository of principles, rules and standards which cannot be ignored in future decisions.¹³³ What has been advocated above is not just coherency of decisions but consistency of approach. The present writer has insisted that consistency does not mean that a rule/principle, once adopted, cannot be overruled; it requires not just that the Court be consistent in the application of precedent, but most importantly, that the Court should maintain a consistent approach. It must be consistent in the criteria by which it determines whether to maintain, distinguish or overrule a precedent.

4.5 The Authority of Precedents in the ICJ

It is one thing to show that a court habitually cites its precedent it is another thing for the precedents to be binding. A precedent could be cited for either of two reasons: (a) it may be to show a course once accepted by a court; or (b) it may be for the application of a rule/principle of law established by a court in that precedent. These emphasise the two

¹³¹It certainly would hamper the development of international law for the Court to adopt a rigid system of binding precedent that it cannot subsequently modify. See John C Gardner, “Judicial Precedent in the Making of International Public Law” 17 J. Comp. Legis. & Int’l L. 3d ser. 251, 255 (1935)

¹³² *Second Genocide case* note 4, p.435, para 76

¹³³ Introduction to Manley Hudson’s World Court Reports vol. 1, p. Xiv, (1922-1926)

important components of every decided case – facts and rules/principles of law. On the first point, a court may refer to a precedent simply to show that it was not doing anything new: it merely followed a course adopted previously. The bottom line is that the decision being reached by the court is not predicated on the authority of a rule/principle established in the precedent. In such cases, the court would still have followed that course even if it had not cited the precedent, so that the precedent is only a supplementary ground for a decision already well-founded on a legal rule independent of the precedent.

On the other hand, where the reasoning and conclusion of a court draw strength from rules/principles established in a precedent, it becomes of less importance whether a precedent is generally binding or not. The crucial question must then lie on whether the rules/principles in the precedent are rules/principles of law for that court and for the parties in the cases the court is called upon to decide.

4.5.1 Ascertaining the Weight of Precedent

As earlier said, the fact that the ICJ is a court of first and final jurisdictions makes it possible for only horizontal precedent to function in the Court. As a result, it is quite difficult to precisely measure the weight it attaches to precedent, given that as a Court of last resort, it has an inherent power to decide to follow, modify or overrule its own precedent. The difficult question is how to tell that it followed a precedent for the rule/principle it contains and not for illustrative purposes. In approaching this issue, the writer shall call in aid the technique of the common law, which is based on two legal terminologies – *ratio decidendi* and *obiter dicta*.

As a prelude, it is important to state that it is not being suggested that the ICJ applies the rigid delimitation between the terminologies. Indeed as Jennings clearly asserted: international law texts hardly mention the term *ratio decidendi*, and the authorities who command respect have

stated that the idea of finding the *ratio decidendi* has no place in the international sphere.¹³⁴ This writer does not dispute this assertion. However, like Jennings, and adopting his words, it is difficult to understand why a technique found essential in one system of law should be disqualified from assisting in the international system.¹³⁵ In the present view, except there are better ways of distinguishing that part of the decision which should be regarded as law-creating and applied to future cases as rules/principles of international law, from the part which are merely illustrative, the use of the substance of the common law terminologies are unavoidably vital to any question relating to the use of precedent by a court that heavily relies on its previous decisions as does the ICJ.

The above notwithstanding, there are occasions, albeit sparing, where the terminologies have been adopted in the case-law of the Court. In *Certain Expenses of the United Nations*,¹³⁶ Judge Spender identified an observation in the Advisory Opinion of the Permanent Court in *Competence of the International Labour Organisation*,¹³⁷ as “*obiter dicta*”; explaining that the observation “has little if any jurisprudential value on the matter presently being considered”. In the *Western Sahara case*, the Court summed up the argument of the parties to the effect that it was “maintained that the present case falls within the principles applied in those two decisions and that the *ratio decidendi* of the *Status of Eastern Carelia* case is not applicable to it”.¹³⁸ The use of the terminologies in these cases is consistent with their common law uses.

The common law distinguishes between *ratio decidendi* and *obiter dicta*. *Ratio decidendi* is defined in Salmond’s Jurisprudence “as a rule of law applied by and acted on by the court, or

¹³⁴ R.Y Jennings, “The Judiciary, International and National, and the Development of International Law” 45, Int’l & Comp. L.Q 1, 10, 12 (1996); see Hersch Lauterpacht, *Development of International Law by the International Court*, 61 (London: Stevens & Sons Ltd 1958) (arguing that, “it is not conducive to clarity to apply to the work of the Court the supposed rigid delimitation between *obiter dicta* and *ratio decidendi* applicable to a system based on the strict doctrine of precedent”.)

¹³⁵ *Ibid*

¹³⁶ Note 1, Separate Opinion, p. 192-193

¹³⁷ PCIJ Series B, No. 2, 1922, pp 40-41

¹³⁸ Note 51, p. 23, para 28

the rule which the court regarded as governing the case".¹³⁹ It is the binding element in decided cases. *Obiter dicta*, on the other hand, arises when a judge, in the course of adjudication, makes an observation, which is not particularly relevant to the resolution of the live issues in a case and which is not based on the facts of the case; this is not binding but merely persuasive.¹⁴⁰

Accordingly, where the ICJ applies a legal rule/principle adopted in a previous case to the facts of a present case to reach a judgment – that is, applying the rule/principle in the cited case as the legal premise for the legal conclusion in the present – it would be concluded that it applied the rule/principle adopted in that previous case as authority for the conclusion reached in the case at hand. As a logical consequence, it could be argued that the Court applied the rule/principle because it is a rule/principle of law, binding as such on the Court and on the parties before it. This is particularly so, because the ICJ, being bound by its Statute, cannot apply a rule/principle except the rule/principle is a rule/principle of international law. On the contrary, where the decision of the Court does not rest on a legal rule/principle in a previous decision cited by the Court, in the course of reaching a decision presently; or where the rule/principle was applied to a hypothetical scenario, it could be said that the Court cited the case for mere illustrative purposes – that is, as *obiter dicta*. The real test is whether the court would have reached the decision, absent a previously determined rule/principle in its precedent.

Drawing from the cases already discussed above and those to be discussed presently, this writer shall contend in the next section that the Court follows its precedents, not just for academic or illustrative purposes, but because it finds the rules/principles adopted in previous cases germane to the resolution of legal issues at hand. This position challenges the general

¹³⁹ P.J. Fitzgerald, note 10, p. 175- 183

¹⁴⁰ *Ibid*

view that judicial decisions are not a source of international law. In order to challenge this view, it must be shown that the Court does not merely apply precedents as persuasive aids but applies precedent because it lays down rules/principles which the Court considers itself bound to follow, as an essential aspect of its judicial character, whether or not the Court actually pronounces that it was bound by the doctrine of binding precedent. This is a different and a most fundamental question to the one treated in the preceding sections. Previously the writer was interested in showing that the Court considers itself duty bound to maintain consistency of reasoning in decided cases, except where reasons dictate otherwise. What the writer now seeks to discover and differentiate from the real decision in a precedent is the rule/principle cited and applied as precedent – what has earlier been analogised with the common law notion of *ratio decidendi*. This, as was earlier stated in this chapter, is different from the depositif of a judgment. In other words, the writer now seeks to elucidate on what makes it possible for the Court to maintain coherency, despite the absence of a formal doctrine of judicial precedent.

In order to deal with the issue with some level of simplicity, rather than discuss “binding precedent”, the writer shall discuss “binding principles”. The writer shall concentrate on whether the Court holds rules/principles adopted in its earlier decisions as legal rules/principles. If they are legal rules/principles, it would unarguably mean that they are binding rules/principles of international law, in accordance with which the Court must decide. This is essential not only to the relevance of judicial decisions but also to the entrenchment of equality of treatment encapsulated in the rule of law. This would help us avoid the *stare decisis*-based argument, which has so far beclouded the issue.

The popular view of which we are often reminded by text writers¹⁴¹ and Judges of the Court is that in the absence of *stare decisis*, the ICJ has no rule of binding precedent.¹⁴² Judge Koroma once said that the Court does not recognise the principle of *stare decisis* and that it is part of its jurisprudence that legal principles accepted by the Court in a particular case are not binding upon other States in other disputes.¹⁴³ And that the Court “has shown a tendency to develop the law, to interpret the law and not to consider itself burdened or bound by previous decisions”.¹⁴⁴ Judge Weeremantry reminded us that:

while in domestic jurisdictions where the doctrine of *stare decisis* applies, the other parties in transactions of an identical nature may find themselves bound by a principle of law laid down in a case to which they are not parties, in international law, third parties have the further safeguard of the absence of a doctrine of *stare decisis*.¹⁴⁵

Seeking after the application of the *stare decisis* rule as the indicator of the normative character of the judgments of the Court would invariably rob rules/principles in those judgments, their normative character for the wrong reasons. They search in vain for a concept that would not exist in the form that it is known at common law, those who seek the strict application of the rule as a prerequisite for judicial decisions to be a source of law.

If it is true that legal rules/principles accepted by the Court in a particular case are not regarded as binding upon other States or in other disputes, why is the application of such principles frequently a fundamental aspect of the Court’s reasoning process and the arguments of contending States? Why would rules/principles previously accepted “control...

¹⁴¹ I. A Shearer, *Starke’s International Law*, 41 (11th Ed. Butterworths London 1994) (arguing that though the PCIJ followed its prior decisions which were of a similar trend, it did not purport to bind itself by any expressed doctrine of judicial precedent. And that it would be misleading to say that any decision of the PCIJ (by extension the ICJ) created a binding rule of international law. He based this view on article 59)

¹⁴² Judge Ajibola, *dissenting, Cameroon v Nigeria*, note 13, p. 401

¹⁴³ Judge Koroma, *dissenting, ibid*, p. 380. It is worth noting that Judge Koroma made this statement while urging the Court to depart from the principles adopted in the *Right of Passage case*, note 61.

¹⁴⁴ *Ibid*. The tenacity of Judge Koroma’s view can even be questioned on the basis of his earlier view that the decision in the *Right of Passage case* “controlled ... [the] outcome” in the judgment on Nigeria’s preliminary objection, *ibid* p. 380

¹⁴⁵ *Dissenting, East Timor case, (Portugal v. Australia)*, ICJ Rep. 1995, 90, 170

the outcome”¹⁴⁶ in a subsequent case? Why do previously adopted rules/principles become an “obstacle to the Court in choosing reasons”¹⁴⁷ in subsequent cases? Why do States usually argue on the basis of rules/principles adopted in previous decisions? Why is the Court strongly criticised whenever it fails to follow a precedent without sufficient reasons? Even Judge Koroma has had cause to criticise the Court for departing from its precedent without good reasons, when in a joint dissenting opinion, he appended to the view that “it was regrettable that ... the court chose to depart from its own jurisprudence”.¹⁴⁸

If what has been said above, regarding consistency and the unwillingness of the Court to overrule itself even in deserving cases, are anything to go by, they strengthen the view that the Court considers that the lack of consistency in its judgments would unsettle international law. It also shows that the Court considers itself bound by rules/principles in the cases. The approach of the Court is, however, more profound than the maintenance of consistency; it largely implicates adherence to the rule of law embedded in the cases.

To the present view, the combination in the practice of the Court of all the attributes of *stare decisis* as it operates in an apex court within a common law system is not without consequence. To discover the consequence, it is imperative to understand, from the outset, that there is no way the ICJ can function like municipal courts, let alone common law courts. It should therefore be wrong to seek to establish a concept in the form in which it operates in municipal law, as much as it should be wrong to expect judicial lawmaking in the international system to be strictly patterned after a particular legal system.

While it is true that the ICJ does not follow a system of binding precedent; this may well be as to form. In substance, there is hardly a difference between the approach of the Court and the substantive working of the practice of binding precedent, as it applies in a common law

¹⁴⁶Judge Koroma, dissenting, *Cameroon v Nigeria*, note, 143, p. 380

¹⁴⁷ Judge Tanaka, note 39, p. 69

¹⁴⁸ Joint Dissenting Opinions of Judges Ranjeva, Shi and Koroma, note 97, p. 274 para 17

court of last resort. Accordingly, the fact that binding precedent does not describe the practice of the Court does not mean that the Court does not adopt the substantive content of the concept. For it is hardly disputable that the Court follows a similar approach to the practice of binding precedent and this may explain why authors and judges alike, even while denying the existence of a practice of binding precedent in the Court, often fail to differentiate, in clear terms, how the substantive approach of the Court differs from the practice of binding precedent. Consciously or unconsciously, such judges and scholars often end up asserting the existence of the substance of the concept after denying its existence in form.¹⁴⁹ For instance, in *Cameroon v. Nigeria*, just after judge Ajibola had denied the existence of *stare decisis* in the Court, he agreed that “in practice ... the Court, in most cases, relies upon and follows its previous decisions”.¹⁵⁰

It is difficult to see how the substance of the practice of the Court, as admitted in many cases, differs from the substance of the practice of binding precedent. If the Court does not attach legal authority to rules/principles in its previous decisions, why is it necessary to urge the Court to depart from an earlier decision and why is it significant that the Court had in fact departed from or refused to depart from rules/principles in its previous decisions? Even if it was argued that this is for the maintenance of coherency, this would yet strengthen the view that rules/principles of law established by the Court could become settled through consistent application. In the Joint declaration of Vice President Renjeva, Judges Guillaume, Higgins, Kooijmans, Al-Khasawneh, Buergenthal and Elaraby, in *the Use of Force case*, the Judges were clear on the point that the Court must not only maintain consistency with its own past

¹⁴⁹Rudolf Bernhardt, note 43, p 1235 (stating that the Statute does not recognise the binding force of a judgment beyond the individual case, but that the Court can and should apply the law as developed in judicial decisions); Shabtai Rosenne, *Essays on International Law and Practice*, p. 130 (Martinus Nijhoff Publishers, Leiden. Boston 2007) (affirming that there is no *stare decisis* rule in the Court but agreed that the Court “has become a primary generator, both of specific rules and trends of general international law”).

¹⁵⁰ Dissenting, in *Cameroon v Nigeria*, note 13, p. 401

case-law in order to provide predictability, but that it must also be mindful of the possible implications and consequences of its decision for other pending cases.¹⁵¹

This is more so because it is part of the case-law of the Court that rules/principles adopted in judgments have continuous applicability beyond the cases in which they were adopted. According to the Court in the *Northern Cameroons* case, “if in a declaratory judgment it expounds a rule of customary law or interprets a treaty which remains in force, its judgment has a continuing applicability”.¹⁵²

If a rule/principle in a decided case has continuous applicability, it can be continuously applicable only as a rule/principle of law, having applicability to analogous cases, except it is distinguished or overruled. This clearly explains why the Courts feel obliged to show deference to rules/principles in previous judgments.

It is important to bear in mind, however, that the fact that a concept is not formally recognised within a given system in the terminology in which it is recognised in another, does not mean that the substance of the approach or the rule described in that terminology does not exist in that other system. As the Court counselled in *Fisheries Jurisdiction*:

It is one thing to seek to determine whether a concept is known to a system of law, in this case international law, whether it falls within the categories proper to that system and whether, within that system, a particular meaning attaches to it: the question of the existence and content of the concept within the system is a matter of definition....¹⁵³

It is one thing to say that the Court does not recognise the practice of binding precedent, it is certainly another to conclude from that assertion that the content of the rule is completely non-existent in the practice of the Court. It is moreover untenable to conclude from that

¹⁵¹ Note 45, p. 1353-1354, para 3

¹⁵² (*Cameroon v. United Kingdom*) *Preliminary Objections*, ICJ Rep 1963, 15, 37

¹⁵³ (*Spain v. Canada*) ICJ Rep 1998, 432, 460, para 68. The Court has repeatedly affirmed that “it is not bound to attach to matters of form the same degree of importance which they might possess in municipal law”. – *Mavrommatis Palestine Concession*, note 93, p. 34

assertion that rules/principles in judgments cannot be binding. This point was succinctly made by Judge Zoricic thus:

it is quite true that no international court is bound by precedents. But there is something which this Court is bound to take into account, namely the principles of international law. If a precedent is firmly based on such a principle, the Court cannot decide an analogous case in a contrary sense, so long as the principle retains its value.¹⁵⁴

It is therefore important to seek to understand the style of the Court within the peculiarities of the legal environment within which it exists.

Care must, however, be taken not to assume that the Court has adopted the common law style of binding precedent, as the Court appears to enjoy certain flexibility inherent in its nature as an international court straddling between two systems of law with different approaches to judicial lawmaking, as discussed in chapter one.

To put the present writer's perspective of the purpose for which the Court cites its precedents beyond doubt, two fundamental tests are proposed, viz: (a) do decisions of the Court logically flow from a legal premise contained in previous cases? (b) Do principles adopted in precedents constrain the reasoning and conclusion of the Court in subsequent case?

If rules/principles adopted in a one case are a source of law for another case, the decision in the latter case would logically flow from the said rule/principle. In other words, the rules/principles would be seen to be the major legal premise on which the reasoning and conclusion of the Court in a subsequent case rested. Also, if rules/principles adopted in previous cases constrain the reasoning of the Court and limit the legal options open to it, the only tenable conclusion there can be is that the rule/principle were a law for the Court. Though both questions are differently framed, they require the same approach, which is the

¹⁵⁴ *Dissenting, Peace Treaties*, note 48, p. 104

finding of the principle (what we have earlier identified as the *ratio decidendi* under the common law system), in the previous case that was applied or which constrained the choices open to the Court in a subsequent case.

4.5.1(a) Rules/Principles in Previous Decisions as Legal Premise

Cases abound where it can indisputably be said that the rules/principles adopted in a precedent cited by the Court was the legal premise for the conclusion of the Court concerning the issue the precedent was applied to. A few cases would buttress this.

In *Benin v. Niger*,¹⁵⁵ a Chamber of the Court had to determine the probative value of maps in a boundary dispute between Benin and Niger. Both parties had relied on maps in order to determine the indicative co-ordinates of precise points on their common frontier. To determine the weight to be attached to the maps, the Chamber relied on *Burkina Faso v. Mali*.¹⁵⁶ In the latter case, a Chamber of the Court had determined that maps cannot of themselves be evidence of territorial title because they merely constitute information which varies in accuracy from case to case. The Court laid down the rules for determining the legal force of maps thus: (a) for a map to possess legal force, it must fall into the category of the physical expressions of the will of the State or States concerned; such as when maps are annexed to an official text of which they form an integral part;¹⁵⁷ (b) when maps meet the condition in (a), they would form an irrebuttable presumption, tantamount in fact to legal title; (c) otherwise, the only value maps possess is as evidence of an auxiliary or confirmatory

¹⁵⁵ *Frontier Dispute*, ICJ Rep 2005, 90

¹⁵⁶ *Frontier Dispute*, ICJ Rep 1986, 554, 582 para 54 (the view of the Chambers in this case was affirmed and followed by the Court in *Nicaragua v. Honduras*, note 27, pp. 723-724, para. 217-219

¹⁵⁷ *Ibid.*, p. 582, para 54. See also, *Benin v. Niger*, note 155, p.119 para 44

kind, and this also means that they cannot be given the character of a rebuttable or *juris tantum* presumption such as to effect a reversal of the onus of proof.¹⁵⁸

Relying on these legal requirements as its legal premise, the Chamber of the Court in *Benin v. Niger*, held that since: (a) neither of the parties claimed that the maps have any “intrinsic legal force” in the sense that they represent the “physical expression of the will of the States concerned; and (b) that none of the maps were annexes to an official text,¹⁵⁹ that they possessed only the relative force conferred upon them by the decisions in *Burkina Faso v. Mali*.¹⁶⁰ Accordingly, they did not form an irrebuttable presumption tantamount to a legal title. Later in the judgment, the Court concluded that “Certainly, maps — unless they are annexed to an administrative instrument, and hence form an integral part thereof, which is not the case here — possess only the relative force conferred upon them by the jurisprudence recalled above”.¹⁶¹ In other words, the *Benin v. Niger* Court had no view on the matter aside that predetermined in the precedent.

In the *North Sea Continental Shelf Cases*,¹⁶² the question before the Court was whether Germany, which was not a party to the 1958 Geneva Convention on the Continental Shelf, was nonetheless bound by the rule of equidistant delimitation of the Continental Shelf enacted in article 6 of that Convention. The argument of Denmark and the Netherlands was that the said rule had, subsequent to adoption of the Convention, become a rule of customary international law binding on non-parties to the Convention, including Germany.

To determine the validity of this argument, the Court had recourse to its previous decision in the *Lotus case*.¹⁶³ The *Lotus case* is famous for the rule that for acts of States to become a

¹⁵⁸ *Ibid*, p. 583 para 56

¹⁵⁹ *Benin v. Niger*, note 155, p. 128, Para. 81

¹⁶⁰ *Ibid*, p. 147, para 138

¹⁶¹ *Ibid*, p. 147, para 137

¹⁶² *Federal Republic of Germany v. Denmark/Netherlands*, ICJ Repts 1969, 3

¹⁶³ PCIJ Series A, No. 10 1927, p. 28.

rule of custom, States must have been conscious of having a legal duty to act in that way. And that such a consciousness must be inferable from the facts alleged to constitute the rule of custom.¹⁶⁴ This view was taken by the PCIJ when, like Denmark and the Netherlands in *North Sea Continental Shelf Cases*, France was seeking to establish a rule of general international law binding on Turkey in cases of collision on the High Sea. Like Denmark and the Netherlands, France had also referred to instances of action which supported her argument.

It was, perhaps, for these close similarities that the Court could not conceal the fact that it was applying the *Lotus ratio* to the Case. The Court expressly admitted that it was following the rule adopted by the PCIJ in the *Lotus case*, and that it was “applying this dictum to the present case”.¹⁶⁵ Accordingly, the Court decided that the instances of actions alleged by Denmark and the Netherlands did not justify the emergence of a rule of custom.

It should be appreciated that the question of the quality of a rule that becomes a rule of custom is not stated in article 38(1) of the Statute of the Court, which vaguely provides for the application “of customs as evidence”. It has therefore been for the Court to determine whether an alleged rule is actually a customary rule. The Court apparently had to rely on the *Lotus case* as the most authoritative statement of the quality of a rule that can be said to be a customary rule. The rule adopted in the *Lotus case* was thus authoritative for the decision reached by the Court. The fact that the Court cited no other authority lends credence to this assertion.

In *Nicaragua v. Honduras*,¹⁶⁶ the Court extracted the legal conditions to be fulfilled in a claim for territorial sovereignty from its previous decision in the *Eastern Greenland case*. Having identified the legal conditions and without pretending that they were either customary

¹⁶⁴ *Ibid*

¹⁶⁵ Note 162, p. 44 Para. 78

¹⁶⁶ Note 27

law or conventional principles, the Court held that Nicaragua did not satisfy “the criteria formulated by the Permanent Court of International Justice in the *Legal Status of Eastern Greenland* case”.¹⁶⁷

The logical connection between the rules/principles in the cases relied upon by the Court and the eventual decisions in the subsequent cases are clearly visible in the cases discussed above. More apparent still, is that the Court employed clear languages that emphasised the logical sequence between the rules/principles in precedent and the decision reached in subsequent cases. These rules/principles were not only decisive for the Court but also for the States to whose cases they were applied.

4.5.1 (b) Principles in Precedents Constrain Reasoning and Determine Conclusions in Subsequent Cases

The relationship between precedent and cases at hand are so intricate in the legal reasoning of the Court that the Court is unable to reason independent of its precedent. As a corollary, occasions are rife where rules/principles in precedent constrained the reasoning of the Court and determined the conclusion reached in subsequent cases. A few cases – *Temple of Preah case*; *Barcelona Traction case*; *DRC v Uganda*; *Cameroon v. Nigeria*; *the first and second Genocide cases* – would buttress this observation. In all of these cases, which have been discussed above, the options open to the Court were constrained by pre-existing rules/principles in its precedents.

In the first two cases, without the *Israel v. Bulgaria* precedent, the Court would simply have reached the conclusion it reached without having to dedicate much time and efforts towards

¹⁶⁷ *Ibid*, p. 721, para 208

justifying why the interpretative rule in the *Isreal v. Bulgaria case* would not apply. This fact was acknowledged by Judge Tanaka, when he said:

Thus the doctrine of lapse by dissolution which was incorporated in the Judgment in the *Aerial Incident case* has remained intact. It has offered a powerful tool to those States which were not inclined to submit to the compulsory jurisdiction of the Court by the application either of Article 36, paragraph 5, or of Article 37 of the Statute. It has become an indirect obstacle to the Court in choosing reasons.¹⁶⁸

There is even the strong possibility that the objection would not have arisen had the Court not reached the conclusion it reached in the *Bulgaria case*. After all, the Court acknowledged in the *Barcelona Traction case* that Spain did not raise the objection until after the lapse by dissolution rule was adopted in the *Bulgaria case*. It is worth recounting that the *Bulgaria case* held that the acceptance of the compulsory jurisdiction of the PCIJ by non original members of the UN was not renewable in that it lapsed in the interval between the dissolution of the PCIJ and the creation of the ICJ.

Also, the dissenting opinions in *Cameroon v. Nigeria* and *DRC v. Uganda* show that the Court, perhaps, would have reached different conclusions had the *Right of Passage case* and the *Nicaragua case*, respectively, not dictated the course followed by the Court. In *Cameroon v. Nigeria*, in particular, the Court stated that it had to be shown why it should not follow the rule in the *Right of Passage case*. In *DRC v. Uganda*, the conclusion reached by the Court on what constitutes armed attack was clearly dictated by the *Nicaragua case*.¹⁶⁹

The bottom-line of the points being made here is that if rules/principles adopted in previous cases have no relevance as rules/principles of international law, the Court would not bother justifying their exclusion in any particular case. Again, even if this practice was based on the maintenance of coherency, it yet leads to the same conclusion given that coherency results in

¹⁶⁸ *Separate Opinion, Barcelona Traction case*, note 39, p. 69

¹⁶⁹ See pp. 121, 123-127 above

the formation of rules/principles of law in decided cases in both the common law and the civil law systems.

Having answered both questions in the affirmative, the writer makes bold to say that the Court cites and follows its precedents, not just for illustrative or felicitous purposes, but for the value of the legal rules/principles underpinning them.

4.5.1. (c) The Authority of Precedent: More Elucidation

Added to the above is the fact that a rule/principle adopted by the Court on a point of law is not only regarded as the correct legal position, it is also regarded as the law governing the point with “continuous applicability.”¹⁷⁰ Accordingly, the Court has shown itself obligated to consider and apply the rules/principles it had established in its case law regarding a question of law that again falls to be considered in future cases, except there are legally justifiable reasons for the Court to take a different view. As could be gathered from the decision of the PCIJ in its *Interpretation of Judgments Nos. 7 and 8 (the Chorzow Factory)*,¹⁷¹ a judgment of the court, “ensure[s] recognition of a situation at law”; which once established, “the legal position ... cannot again be called in question in so far as the legal effects ensuing therefrom are concerned”.¹⁷²

Indeed, if the legal premise for the decision of the Court in a certain case is a rule/principle it adopted in a previous case, it would be contradictory to accept the decision as stating the correct position of the law while at the same time saying that the rule/principle applied by the Court was not a legally binding rule/principle. In the dissenting Opinion of Judge Owoda in *second Genocide case*, the Judge declared that if the reasoning in the previous case of *the Legality of the Use of Force* is to be respected in the absence of particular reasons to depart

¹⁷⁰ *Northern Cameroons*, note 152

¹⁷¹ PCIJ Series A. No. 13, p. 20

¹⁷² *Ibid*

from it, the Court must reach the same conclusion reached in that precedent.¹⁷³ In the same case, Judge Ranjeva affirmed that “Unlike *ad hoc* arbitral courts, it is considered imperative for the Court to abide by its own case-law to assure certainty in legal relationships between States”.¹⁷⁴

This creates a sort of ambivalence, which could be resolved also by reliance on the reasoning of the Court in the *North Sea Continental Shelf Cases*, where it declared:

Whatever the legal reasoning of a court of justice, its decisions must by definition be just.... Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules....¹⁷⁵

It thus follows that if a decision of the Court finds legal justification in a rule/principle adopted in previous cases, that rule/principle cannot but be regarded as a rule/principle of law.

Indeed the question as to whether rules/principles in judicial decisions are applicable as rules/principles of law has been put beyond doubt by the Court. In the *Gulf of Maine case*, while considering the applicable rules to delimitation of maritime boundaries, the Chamber reasoned that it was unrewarding to seek for rules of customary law in the field of delimitation, which was still new and unconsolidated, for the solution of delimitation problems.¹⁷⁶ Having so observed, the Chamber concluded its review of,

...the rules of international law on the question to which the dispute between Canada and the United States relates by attempting a more complete and, in its opinion, more precise reformulation of the "fundamental norm" already mentioned. For this purpose it will, inter alia, draw also upon the definition of the "actual rules of law . . . which govern the delimitation of adjacent continental shelves - that is to Say, rules binding upon States for all delimitations" which was given by the Court in its 1969 Judgment in the North Sea Continental Shelf cases...¹⁷⁷

¹⁷³ Note 45, p. 499, para 6

¹⁷⁴ *Ibid*, p. 425, para 8

¹⁷⁵ Note 162, p. 48 Para 88

¹⁷⁶ (*Canada v. the United States*), ICJ Repts 1984, 246, 299, para 111

¹⁷⁷ *Ibid*, p. 299, para. 112

This trend is also shown in cases brought to the Court by special agreements in which the Court is requested to decide in accordance with international law as contained in article 38(1) of its Statute. It is often the case that, both in the arguments of the parties and the judgments of the Court, copious reliance are placed on rules/principles previously adopted by the Court in decided cases between entirely different parties. It has never been argued in any of such cases that rules/principles in judicial decisions are not part of the laws in article 38(1), as contemplated in the special agreement.

In *Malaysia v. Singapore*,¹⁷⁸ article 5 of the agreement stated: “The principles and rules of international law applicable to the dispute shall be those recognized in the provisions of Article 38, paragraph 1, of the Statute of the International Court of Justice”. The Chamber of the Court resolved a number of fundamental legal issues in reliance solely on its case-law. The Chamber relied on the *Eastern Greenland case*¹⁷⁹ for the rules governing a territory over which there had been no contrary claim. Also in order to determine whether a low tide elevation was susceptible of appropriation, the Chamber relied on the rule adopted by the Court in *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*.¹⁸⁰ It is important to remember that the Court made it clear in *Qatar v. Bahrain* that it was not applying any pre-existing rules to the question whether low tide elevations are territories, because there was no applicable customary or conventional rule.¹⁸¹ In the *Gulf of Maine case*, the Chamber was requested to decide “in accordance with the principles and rules of international law applicable in the matter as between the Parties...”.¹⁸² But the Chamber expressly applied “rules binding upon States for all delimitations” which was given by the

¹⁷⁸ Note 18, p. 19, para 4

¹⁷⁹ Note 19

¹⁸⁰ Merits ICJ Rep 2001, 40, 100-102, paras 204-206

¹⁸¹ *Malaysia v. Singapore*, note 18, p. 101, para 297

¹⁸² Note 176, p. 253, para 5

Court in its 1969 Judgment in the North Sea Continental Shelf cases....”¹⁸³ Yet the parties did not dispute the application of the rules in the 1969 judgment as rules of international law.

It is important to state at this point that judicial precedent is a technique and thus more of a procedural rather than a substantive matter. That the Court which is at liberty to decide issues of procedures, not expressly covered in its Statute, is equally at liberty to follow the technique that best ensures the fulfilment of its purpose. After all, the Court is, “at liberty to adopt the principle which it considers best calculated to ensure the administration of justice”.¹⁸⁴ It should therefore be appreciated that the ICJ, as a Court of justice is empowered to determine its procedure. Indeed, the framers of the Statute did not attempt to gag the Court in matters of rules and procedures. In *Libya v. Malta*,¹⁸⁵ the Court relied on the work of the Advisory Committee of Jurists of 1920 and its case-law for the view that:

it was agreed not to try to resolve in the Rules of Court the various questions which had been raised, but to leave them to be decided as and when they occurred in practice and in the light of the circumstances of each particular case.

In the absence of a rule in its Statute prescribing a particular technique, the Court should be at liberty to follow the technique or system that best suits the administration of justice, ensures coherency and preserves its judicial character. In the absence of codification, the best approach is that which prevails in the case-law of the Court: the application of rules/principles in precedents as rules/principles of law to similar factual situations. This is consistent with one of the purposes of the Court – the development of international law.

According to Judge Ranjeva:

¹⁸³ *Ibid.* Also States often refer to judgments of the Court and the “principles ...[they] enunciated” – Separate Opinion of Shahabuddeen in *Denmark v. Norway*, note 107, p. 180

¹⁸⁴ *Mavromatis Palestine Concessions*, note 93, p. 16.

¹⁸⁵ *Continental Shelf, Application of Italy to Intervene*, ICJ Rep 1984, 3, 27, Para. 44.

An arbitral court, unconstrained in its decisions, is responsible for its judgment only to the parties which have consented to its jurisdiction. A court of law, on the other hand, acts within the context of a concept of legal policy; it has a heritage to uphold embodied in its jurisprudence, which helps promote legal certainty and the consistency of the law... the International Court of Justice enjoys operational autonomy ... Moreover, the Court is recognized as having a specific mission, and one which is willingly attributed to it: to be a catalyst for the scientific development of international law.¹⁸⁶

The fact that the ICJ is a permanent court with permanent judges and a growing compulsory jurisdiction; the fact that it is not constrained by the dependency on parties and the *ad hoc* nature of arbitral tribunals; and also the fact that it operates within a system of law that is largely not codified, makes it impossible for it to disregard a judicial technique that best enables it fulfil its functions of developing international law. Whether it is accepted or denied, the ICJ has and shall continue to enunciate rules/principles of international law. What the Court is unlikely to do is to regard a rule to be established by a single decision; or for an established rule to be immutably fixed.

If this writer is wrong about this, it would simply mean that the Court has continuously failed to adhere to the provisions of its Statute which commands it to determine cases in accordance with international law in every case that the Court had relied on rules/principles in its earlier decisions in deciding subsequent cases submitted to it.

The writer shall conclude by recapping what has been said above. So far, the writer has endeavoured to show the relevance of judicial decisions in article 38(1)(d) in the practice of the Court and, ultimately, to the development of international law. Due to the importance of this aspect to the general scheme of this thesis, it was not such that could be dismissed in a few words, hence this lengthy but fulfilling discussion. It is fulfilling in that through the different stages of the discussion, the writer has demonstrated that the Court follows its precedent methodologically. It has also been shown that the Court does not follow its precedent as a matter of style but because it sees the rules/principles contained in them as

¹⁸⁶ *Dissenting, Second Genocide case*, note 4, p. 482, para.1

rules/principles of law. It has been strongly argued not only that judicial decisions are a source of international law, but also that the rules/principles emanating from judicial decisions are binding upon the Court and upon States that appear before it, and with ramifications for all States, generally. In the final analysis, the writer is of the firm view that rules/principles in judicial decisions are rules/principles of international law, in accordance to which the Court must decide within the stipulation of article 38(1).

It remains to be said, by way of a reminder, that this conclusion is tentatively reached only on the basis of article 38(1), which is the article that defines the sources of international law. The conclusion has been reached independently of article 59, which shall be discussed in detail subsequently, with a view to discovering if the actual practice of the Court negates the conclusion the writer has reached here.

Chapter Five

Judicial Decisions and International Customs as Interdependent Sources of Law

There is the age-long theory that rather than legislate, judges merely discover a rule that is embedded in customary law. It was of this theory Benjamin Cardozo spoke when he remarked:

The theory of the older writers was that judges did not legislate at all. A pre-existing rule was there, imbedded, if concealed, in the body of the customary law. All that the judges did, was to throw off the wrappings, and expose the statute to our view. Since the days of Bentham and Austin, no one, it is believed, has accepted this theory without deduction or reserve, though even in modern decisions we find traces of its lingering influence.¹

This theory has also been carried into international law regarding the question relating to judicial legislation and the relationship between rules/principles in judicial decisions and customary international law – articles 38(1)(b) and (d) of the Statute of the International Court of Justice (ICJ). This theory was expressed in *Oppenheim's International Law*, where the Editors argued that since judges do not, in principle, make law but apply existing law, their role is inevitably secondary given that the law they propound has some antecedent source.²

This theory also found expression during the deliberations of the Committee of Jurists. De Lapradelle had asked that clause (4) – paragraph (1)(d) – be deleted because they were already encapsulated in clauses (b) and (c) – customs and general principles of law.³ This suggestion was rejected by the Committee, insisting on the retention of the clause as an independent provision. If truly judicial decisions were incapable of generating

¹Benjamin N. Cardozo, *The Nature of the Judicial Process*, 124-125 (Yale 1921), cited in Frederick Schauer, “Do Cases Make Bad Law?” 73 *University of Chicago Law Rev.* 883, 887 (2006)

²Jennings Robert and Sir Watts Arthur (ed.) *Oppenheim's International Law*, 41 (9th ed. Vol. 1, Longman 1922)

³Proces-Verbaux of the Proceedings of the Committee of Jurists, June 16-July 24, 1920, 584

rules/principles of international law from sources other than international customs, the Jurists would have had no difficulty deleting them. It also would not have survived the scrutiny of the other Committees that considered the Draft of the Jurists.

Taken to its logical conclusion, the theory would mean that judicial decisions cannot be a source of law. Since judges do not make law beyond giving expression to pre-existing rules of customs, the rules/principles of law which appear novel in decided cases would actually be rules/principles of customary law or of any other source. But if the cases discussed in the last chapter and in chapter seven are anything to go by, the approach of the Court and of States in those cases strongly challenge this theory.

Indeed, the view that rules/principles propounded by the Court may have their antecedent sources in custom cannot be rightly disputed. However, it is the present view that this is not always the situation, as the Court sometimes creates new rules through deductions and analogies from general principles. Indeed as could be gleaned from the arbitral decision between *Great Britain (Eastern Extension etc Tel co. Claim) v United States (United States-Great Britain Claims Arbitration)*, a Court adjudicating within a largely un-codified system of law, would, no doubt be goaded by novel events to find and construct new rules of law by deducing incidences and consequences specific to a novel situation at hand from corollaries of general principles of law. According to the arbitrators:

...even assuming that there was ... no treaty and no specific rule of international law formulated as an expression of a universally recognised rule governing the case ... it cannot be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and to find – exactly as in the mathematical sciences – the solution of the problem. This is the method of jurisprudence; it is the method by which the law has gradually

evolved in every country resulting in the definition and settlement of legal relations as well between States as between private individuals.⁴

The ICJ often engages in this form of reasoning: deducting new rules of relevant content from general principles, when confronted with novel questions of law. In *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*,⁵ to determine whether low-tide elevations are territories susceptible to appropriation in conformity with the rules and principles of territorial acquisition, a Chamber of the Court admitted that:

International treaty law is silent on the question whether low tide elevations can be considered to be "territory". Nor is the Court aware of a uniform and widespread State practice which might have given rise to a customary rule....⁶

Having made it clear that neither treaty nor a rule of international custom was applicable, the Court had to deal with the issue by deducing from the corollaries of general principles in the Law of the Sea Convention to arrive at the conclusion that low tide elevations are not territories and therefore not subject to separate appropriation as territories. The same approach was brought to bear in *Reparation for Injuries Suffered in the Service of the United Nations*.⁷ Here, the Court took cognisance of the appearance of international organisations on the international scene to deduce legal personality to international organisations, though absent the authority of any treaty or custom allowing same. The Court considered the fact that:

Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances

⁴ Nielsen's Report 73 cited in Hans Kelsen, *Principles of International Law*, 439 (2nd edn. Robert W Tucker ed., 1966, Holt, Rinehart and Winston, Inc.). Also see Jared Wessel, "Judicial Policy Making at the International Criminal Court: An Illustrational Guide to Analysing International Adjudication." 44 Colum. J. Transnat'l L. 377, 386 (2005-2006). (Noting that the unforeseen eventualities of the legislative mind unfold with practice and live litigations before an adjudicatory body, which as of necessity, shall have to fill gaps within a largely un-codified system of law, as international law.)

⁵ Merits ICJ Rep 2001, 40

⁶ *Ibid*, p. 101-102, para., 205

⁷ ICJ Rep 1949, 174. The recodite question asked the Court related to the capacity to bring international claim. The Court acknowledged that this capacity belonged to States on the basis of sovereign equality. The question then was, whether an international organisation possessed that attribute – international legal personality?

of action upon the international plane by certain entities which are not States. This development culminated in the establishment in June 1945 of an international organization whose purposes and principles are specified in the Charter of the United Nations. But to achieve these ends the attribution of international personality is indispensable.⁸

The Court particularly relied on the following findings: (a) that the Charter of the United Nations created an organisation equipped with organs with enormous decision making powers; (b) that the organisation is clothed with legal capacity and privileges in the territory of member States; (c) that the organisation is given power to conclude agreements between it and member States; and in particular, (d) evidence of conventions concluded between the organisation and States.⁹ It was in keeping with its findings that these factors were an indication of principle recognising the international organisations should exercise a right of action under international law, that the Court concluded that the organisation was clothed with the competence required to enable its function to be effectively performed notwithstanding that article 34 of the Statute expressly limits the competence to appear before the Court to States. Justifying this decision, Judge Alvarez proclaimed:

[t]he decision which the Court has arrived at appears to me to be in accordance with the general principles of the new international law, the legal conscience of the peoples and the exigencies of contemporary international life – three essential factors which have to be taken into account in the development of international law.¹⁰

With particular reference to custom, it is the present view that rather than complete dependence, judicial decisions and international customs are interdependent sources in practice. It is the writer's view that judicial decisions have been the greatest catalyst for the crystallisation and development of international customs. As shall be shown below, the question as to whether an alleged rule of custom sought to be applied by the Court satisfies

⁸ *Ibid*, p. 178

⁹ *Ibid*, p. 179

¹⁰ Separate Opinion in *the Reparation case*, note 7, p. 190. In the *Columbia-Peruvian Asylum case*, ICJ Rep 1950, 266, 300-301 Judge Alvarez (dissenting) expressly admitted that the Court created a law to fill the gap in the law, when it recognised that the United Nations have a right to submit international claims; a right not bestowed by either its Charter or the Statute of the Court.

the twin requirements of state practice and *opinio juris* is always a question of judicial choice exercisable by the Court which has the power to decide whether the alleged rule is a rule of custom. The fact that the Court exercises such a great influence is in itself an indication of the role judicial decisions play in the development of customs.

5.1 Judicial Decisions Ripen Customary Laws

Article 38(1)(b) of the Statute of the Court provides for “international customs ... as evidence of general practice accepted as law”. Beyond this vague stipulation, the Statute did not codify the individual rules that are generally referred to as international customs; neither did the Statute prescribe the criteria necessary for a rule to become a rule of custom. Reliance has been placed over time on two criteria – state practice and *opinio juris* – as the criteria which a rule must satisfy to become a rule of custom. But experience has shown through decisions of the Court that the Court does not put its imprimatur on an alleged rule of custom simply because one or more States claim that the rule exist in their practices as law,¹¹ neither does it matter that the alleged rule of custom has been applied by a good number of States.¹² This makes it practically impossible to precisely identify the individual rules that make up what is broadly referred to as international custom. The surest means by which rules of custom have been identified have been when acted upon by the Court.¹³

Instances abound where the Court had held that a rule of custom alleged to exist by a State did not qualify as customary law. In *S.S Lotus*,¹⁴ the Court had to ascertain whether there was a rule of custom, according to which proceedings in cases involving collision on the High Sea

¹¹ See *S.S Lotus*, Series A, No. 10 (1927), 16, 28; *Asylum Case*, *ibid*, p., 266, and *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands)*, ICJ Rep 1969, 3, 43 -44, para 76

¹² *North Sea Continental Shelf Cases*, *ibid*, p. 43, para 74-77

¹³ See Hersch Lauterpacht, “Decisions of Municipal Courts as a Source of International Law” 10 Brit Y.B Int’l L. 65, 88 (1929), for how this relates to customary international law

¹⁴ Note 11, p. 16

were exclusively within the jurisdiction of the flag State. France had urged the Court to affirm the existence of such a custom. The Court held that no such customary law existed.¹⁵

The important role played by the Court in the determination of what qualifies as customary law was particularly displayed in *North Sea Continental Shelf cases*.¹⁶ Here, the Court did not only hold that the rule in question was not a rule of customary law between the parties, it determined that it was not a rule of customary law at all. This was notwithstanding the fact that some States (not before the Court), which were not parties to the 1958 Convention on the Continental Shelf, had adopted the method for an exercise as important as boundary delimitation. According to the Court:

... even if these instances of action by non-parties to the Convention were much more numerous than they in fact are, they would not, even in the aggregate, suffice in themselves to constitute the *opinio juris*; ... The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.¹⁷

International customs, as facts,¹⁸ must be proved before the Court by evidence. The onus of proof is on the party that asserts its existence. It is however, the province of the Court to determine whether an alleged custom satisfies the requisite conditions.

Once the Court accepts that an alleged rule is founded in customary international law, no matter how obscure that rule had been, it becomes a rule of law, which no longer requires to be proved as facts, as the Court must take judicial notice of its existence and the States within the influence of the custom often take the finding of the Court as conclusive. The case

¹⁵ *Ibid*, p. 28. The same approach was adopted by the Court in the *Asylum case*, note 10, p. 266. Here the Court refused to uphold the argument of Columbia that there was a rule of customary international law justifying unilateral and definitive qualification of asylum.

¹⁶ Note 11

¹⁷ *Ibid*, p. 44, para 77. Whether or not the Court should have adopted such a far-reaching view when it had no means of assessing whether these States (not before the Court) actually adopted the method with the necessary *opinio juris* for the formation of customary international law, is a different question altogether. And this is outside the scope of this work.

¹⁸ In *Asylum case*, note 10, p. 277 the Court expressly referred to the alleged custom “as the facts brought to the knowledge of the Court”.

concerning *Reservations to the Convention for the Prevention and Punishment of Genocide*¹⁹ testifies to this view. It was in this opinion that the Court placed its authority on the rule that except expressly specified, a reservation need not be accepted by all parties to a convention for it to be valid, provided it does not offend the object and purpose of the convention. This rule, which was hardly followed before the Court rendered its opinion, has since that opinion become a rule of customary international law. On the other hand, the more established rule: “the absolute integrity of the treaty rule”, lost out of the legal equation because it was rejected by the Court.²⁰

This is even so because the Court does not consider itself bound by the claim of the parties that a particular custom exists, nor does the concurrence of the view of the parties sway the Court in this regard. This indication was given in the *Nicaragua case*, thus:

The Court notes that there is in fact evidence, to be examined below, of a considerable degree of agreement between the Parties as to the content of the customary international law.... This concurrence of their views does not however dispense the Court from having itself to ascertain what rules of customary international law are applicable. The mere fact that States declare their recognition of certain rules is not sufficient for the Court to consider these as being part of customary international law, and as applicable as such to those States.... in the field of customary international law, the shared view of the Parties as to the content of what they regard as the rule is not enough. The Court must satisfy itself that the existence of the rule in the opinio juris of States is confirmed by practice.²¹

The high degree of independence the Court exercises in this regards, lends itself to judicial lawmaking through the broad formulation of article 38(1)(b), by which the Court exercises a strong formative influence on the development, clarification and rejection of an alleged rule of custom.

¹⁹ ICJ Rep 1951, 15

²⁰ See the Dissenting Opinion of Judges Guerrero, Arnold McNair, Read and Hsu Mo, *Ibid*, p. 31.

²¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. the United States) Merit*, ICJ Rep 1986, 14, 97-98, para 184. The same approach was followed in *Maritime Delimitation in the area between Greenland and Jan Mayen, (Denmark v. Norway)* ICJ Rep. 1993, 38, 288 para 110, where a Chamber of the Court stated that each of the party's reasoning was based on a false premise because each was searching general international law for a set of rules which were not there.

This is where judicial decisions and international customs interrelate and are interdependent: international customs rely on judicial decisions for development, clarification and recognition while international customs give the Court sufficient scope and leverage for rule formulation. Indeed the Court does not create customary law; it acts as a catalyst that ripens customs to maturity. By so doing, and as observed by Sir William Holdsworth's regarding the English method, judicial decisions make "the custom and therefore the law certain".²²

It is, however, important to say that the role being played by the Court in the formation and clarification of customary international law is not peculiar to either the Court or international customs. Courts play the same role in national jurisdictions in which a system of customary law is recognised. In Nigeria, for instance, in addition to legislations and case-law, customary law is an enforceable source of law, which is recognised and applied by courts.²³ Just as in international law, customary laws are facts before superior courts in Nigeria until proven to exist by evidence.

Once proven, it becomes a law of which Courts are bound to take judicial notice. Similarly, a rule upon which the ICJ places its imprimatur as a rule of custom becomes assimilated into

²²See John C. Gardner, "Judicial Precedent in the Making of International Public Law" 17 J. Comp. Legis. & Int'l L. 3d ser. 251, 256 (1935). It is open to questioning whether the rules the Court sometimes applies as rules of customs actually fulfilled the requirements of state practice and *opinio juris*. This is particularly so when the Court can take an independent view of an applicable custom. In the same vein it is arguable that the Court sometimes substitutes for the view of States, its own view of what constitutes international custom accepted as law. The Individual Opinions in *Legal Consequences of the Construction of a Wall*, ICJ Rep 2004, 136, and *Armed Activities on the Territory of the Congo (DRC v. Uganda)* ICJ Rep 2005, 168, could justify this point. In these cases, the major plank of opposition to the majority judgment was that the Court ignored a new element in the practice of States and *opinio juris* as expressed in United Nations Security Council Resolutions 1368 and 1373 (2001). It was argued that the resolutions had modified the customary law on the definition of "armed attack" which is required for self-defence in article 51 of the UN Charter (which was held to apply alongside the customary international law relating to the use of force, the *Nicaragua case* (note 23)). The Court has continued to maintain the *Nicaragua* interpretation despite the view, even from among its Judges, that it is at variance with state practice and *opinio juris*. What is more, the Court has even demonstrated its ability to declare a rule contrary to a prevailing customary rule, if the latter becomes outdated in view of the exigencies of the time. In the *Reparation Opinion* (note 7), the purpose and functions test enunciated by the Court was clearly in conflict with the rule of customary international law which recognised States as the only entity having the capacity to bring international claim for diplomatic protection.

²³ In *Zaidan v. Mohassen*, [1973] 1 All NLR (Pt.11) 8611, the Nigerian Supreme Court defined customary law as a "system of law not being the common law and not being a law enacted by the legislature in Nigeria but which is enforced and binding within Nigeria as between the parties subject to its sway".

the body of international law as a distinct rule of customary international law to be applied by the Court in deserving cases.²⁴

In consequence, the formative influence of judicial decisions on international customs cannot be logically disputed. This is a fact accepted by the Court and the States appearing before it. In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,²⁵ a Chamber of the Court was emphatic in acknowledging that the “Court's Judgment of 20 February 1969 in the *North Sea Continental Shelf cases* ... has made the greatest contribution to the formation of customary law in this field” of maritime delimitation.²⁶ The Court also referred to “a substantial contribution” made to international customs by judicial decisions in article 38(1)(d).²⁷

Beyond showing that international customs rely on judicial decisions for its clarification, refinement and development, it does also show that some rules which may appear novel in judicial decisions are actually emerging rules of customs which the decision of the Court ripened by placing its imprimatur on them.²⁸ To that extent the present writer agrees that some of the rules in judicial decisions have their antecedent sources in rules of customary international law, which are at their embryonic stage of development.

It is, however, still arguable that such a rule of custom may not have emerged had the Court not placed its imprimatur on the rule in its case law, as against the many years the rule would have had to be practised as a legally binding rule by States before it could have been accepted

²⁴ The decision of the English House of Lords in *JH Rayner Ltd v Department of Trade*, [1990] 2 AC 418, 513, is to the effect that a rule of international law would be automatically incorporated into the common law; but that “...it is for those who assert the rule to demonstrate it, if necessary before the International Court of Justice”.

²⁵ (*Canada v. the United States*), ICJ Reps 1984, 246

²⁶ *Ibid*, p. 293, para 91

²⁷ *Ibid*, p. 291, para 83

²⁸ The Court has not only shown itself a developer of customary law but also a facilitator of the emergence of new rules in the face of changed circumstances. See *Maritime Delimitation in the area between Greenland and Jan Mayen, (Denmark v. Norway)* ICJ Rep. 1993 38, 61 para 51; *Qatar and Bahrain*, note 5. This, in the present view, is perfectly in order given that, “international law ... has at times ... a twilight existence which is hardly distinguishable from morality or justice, till at length the imprimatur of the Court attests to its jural quality”. – Justice Cardozo, in *New Jersey v. Delaware*, 291, U.S 361, 54 S.Ct. 407, 78 L.ED 847 (1934)

as custom. For instance, there is the strong possibility that the object and purpose rule governing reservations to treaties would not have been recognised as a rule of international custom, had the Court not accepted it as such in *the Reservations case*.²⁹ This is, perhaps, why Greig contended that when there is no sufficiency of state practice and therefore no pre-existing rule, the decision reached by the Court will serve as a direct source of international law for the future. He contended that to consider the new rule as the “determination” of a customary rule would be totally unrealistic.³⁰

It is therefore not infallible to argue that a rule derived from customary law cannot have a distinct existence as a rule in judicial decision. Such a rule, albeit derived from a custom, is by virtue of such derivation a new rule of international law – they either enlarge a pre-existing rule or ripen an emerging rule. Otherwise, there would be no derivation, as the said rule would have been applied as it stood before the decision of the Court. If in future the new element allegedly derived from the custom or treaty is cited, not with reference to the actual practice of States, but with reference to the particular judgment of the Court from which the rule/principle was derived, they err, those who contend that that judgment did not create an independent source of law.

Not even in the case-law of the Court has the fact that rules of customs are distinct from rules/principles in decided cases been denied. In the Separate opinion of Judge Schwebel in *Denmark v. Norway* the judge referred to “... case-law and the accepted customary law”.³¹ The same distinction is evident in the *Gulf of Maine case*.³² This is also self-evident from article 38(1).

²⁹ Note 19

³⁰ D.W Greig, *International Law*, 39 (Second ed. Butterworths: London 1976)

³¹ Note 28, p. 118

³² Note 25

If it is not in doubt that the decisions of the Court have been the major vehicle that has driven the progressive development³³ of customary international law over time, it would be conducive to that established truth to also agree that the expansion of pre-existing rules and creation of new ones by the ICJ, without the participation of States or the political organs of the UN, is a form of systematic lawmaking. It is easy to brand a rule enunciated by the Court as a rule of international custom because the borderline between the former and the latter may be so thin that they could easily fuse as States begin to modify their behaviours to suit the decision. Thus, decisions of the Court can quickly metamorphose into a rule of international custom through States' usages,³⁴ as could be seen in the development of the rules governing land and maritime delimitations. Difficult as it may seem in some cases, it is yet possible to tell what rule was customary to States and what rule emerged from a decision of the Court.

The difference becomes quite obvious when it is appreciated that it is only rules/principles established by the Court and consciously preserved by it that are capable of being accurately determined through the cases. Though decisions are primarily based on treaties or customary international law, these are treaties or customs that existed when the cause of action arose or when the case was decided. The fact that the Court had applied a particular custom or treaty is not a guarantee that such a treaty or custom is immutable; the custom or treaty is susceptible to change and they do change in accordance with the needs and dictates of States. The extinction of the treaty or custom, notwithstanding, precedents continue to bear the mark of rules/principles established by the Court in the interpretation and application of the extinct treaty or custom. The international liability of individuals was first recognised and

³³ This has been defined as a process by which "the Court recognizes new legal obligations that govern previously unregulated behaviour". Jared Wessel, "Judicial Policy Making at the International Criminal Court: An Illustrational Guide to Analysing International Adjudication." 44 Colum. J. Transnat'l L. 377, 387 (2005-2006).

³⁴ This is not peculiar to decisions of the Court. It is generally accepted that a treaty rule otherwise limited in scope may metamorphose into a rule of general usage through the recognition of the rule by States, which were not parties to the original treaty. These States become bound, not by the treaty provisions *per se*, but by the custom emerging from the treaty through usages.

established through the pronouncement of the *Nuremberg Tribunal*,³⁵ following the Nuremberg Charter. The Charter has since been extinct but the principle enunciated therein continues to live a life of its own and it is now part of the corpus of general international law. Also the recognition of the rule that treaties can directly create rights for individuals, albeit with the consent of parties to the treaty, was first recognised in *Jurisdiction of the Courts of Danzig*.³⁶ This opinion was based on the *Danzig-Polish Agreement* of 1921, which had since ceased to exist, but the rule enunciated in the case lived on and has blossomed to maturity.

Furthermore, the argument that the Court cannot state a law independent of customs, presupposes that the reasoning of Judges of the Court is restricted to the application of pre-existing rules. This argument is unpersuasive; it undermines the power of the Court to develop rules of international law to fill gaps and prevent *non liquet*. Also, it is so far-fetched from the realities of what the Court has actually been doing in practice. There are cases where the Court clearly declared that there is neither a treaty nor custom governing a particular point, yet rendered a decision on the point. In cases where the Court explicitly places its authority on an implicit customary rule and nurtured the rule to maturity, the rule will first exist nowhere else but in the authority of decided cases. It is through the case that the rule would often be identified.

In conclusion, the writer has so far argued that rules/principles in judicial decisions are not an extension of international custom, though both share a strong bond of inter-relationship. Their inter-relationship notwithstanding, the writer argued that judicial rule-making does occur in the ICJ, not in total dependence on international customs, but in a situation of interdependence. Accordingly, the writer disagrees with the view that judicial decisions

³⁵*Trial of the Major War Criminals before the International Military Tribunal: Nuremberg, 14 November 1945 – 1946, 171, 223 (1947)* (the decision of the Tribunal that it is only by punishing individuals who commit international law crimes can international law be enforced, is often cited as the *locus classicus* for individual criminal liability for international law crimes.)

³⁶ Advisory Opinion, Series B, No. 15 (1928) 17

cannot be a source of law because the rules they propound are actually rules of international customs.

Chapter Six

Article 59 of the Statute of the International Court of Justice in the Practice of the Court

“[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.” – Article 59 of the Statute of the International Court of Justice.

6.1. Introduction

The flow of thought from the preceding chapters has so far favoured the view that judicial decisions are a source of international law, when article 38(1) is read in disjunction with article 59. Articles 38(1) and 59 have earlier been discussed in chapter two; that discussion was however not exhaustive, as it was mainly based on an analysis of their preparatory work with a view only to determining the object and purpose of the articles. At that point it was found that there was nothing in the preparatory work to justify the assertion that article 59 forbids the use of judicial decisions as a source of international law. In chapters three and four, the writer progressed a bit further to discuss article 38(1)(d), in theory and in the practice of the Court. In these chapters, the writer discussed article 38(1)(d) independent of article 59. On the basis of that discussion, the writer came to the tentative conclusion that judicial decisions are a source of international law. This conclusion was tentative because it was reached independent of article 59. Of course, as indicated previously, the writer is not unaware that article 38(1)(d) is made subject to article 59. Accordingly, any conclusion reached on a disjunctive consideration of article 38(1)(d) is still subject to article 59. To that extent the view taken of article 59 in this chapter would invariably go to confirm or negate the conclusion reached in previous chapters.

It is also important to bear in mind that chapter four shifted the focus from binding decisions to binding rules/principles. It was there argued that the pivotal factor in deciding whether judicial decisions are a source of law – the result of judicial legislation – is whether rules/principles in judicial decisions are rules/principles of international law. The writer did argue that they were rules/principles of international law which States habitually accept. Being in continuation of that chapter, this chapter focuses mainly on whether article 59 has any bearing on rules/principles in decided cases as against the actual decisions in cases.

Having said that, this writer shall now discuss article 59, as espoused in the case-law of the Court.

6.2 Article 59 in the Practice of the Court

It is convenient to begin this discussion with the observation of Rudolf Bernhardt, that it must be borne in mind, when considering the actual practice of the ICJ, that article 59 does not extend to only one easily delimited issue so that no one systematic jurisprudence exists in respect of the article.¹ It is also important to keep in mind that article 59 is one of the most misunderstood provisions of the Statute of the Court and arguably, the most controversial. This fact was taken into account by the Inter Allied Committee on the Future of the PCIJ, which observed that “the effect of this provision [art.59] has, in our opinion, sometimes, been misinterpreted”.²

Notwithstanding these apt observations, through a careful consideration of the decided cases of the ICJ, it is possible to show that article 59 has been used for four different purposes, as follows:

1. Article 59 excludes principles adopted in a case from application in another;
2. To protect third parties from a decision in a case;

¹ Rudolf Bernhardt “Article 59’ in the Statute of the International Court of Justice. A Commentary”, Andreas Zimmermann, Christian Tomuschat, Karin Oellers-Frahm et al ed., 1231-1234, (Oxford University Press: Oxford 2006)

² “Report of the Inter-Allied Committee on the Future of the Permanent Court of International Justice”, reproduced in Am. J. Int’l L, 39 (Suppl. 1945), 1, 20 para. 63.

3. For the purpose of holding parties to a case bound by the decision in the case;
4. To represent *res judicata*.

Each of purposes shall now be elaborated upon.

6.2.1 Article 59 Excludes Principles Adopted in One Case from Application in Another

There are rare instances in the case-law of the Court where it was suggested that article 59 prohibits a principle adopted in a case from being binding in another. The most popular and often cited pronouncement in this regard was made in *Certain German Interest in Polish Upper Silesia*,³ where the PCIJ declared:

Article 59 of the Statute ... does not exclude purely declaratory judgments. The object of this article is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes. *It should also be noted that the possibility of a judgment having purely declaratory effect has been foreseen in article 63 of the statute, as well as in article 36 already mentioned. (Emphasis supplied).*⁴

This pronouncement seems the most far-reaching pronouncement supporting the prohibition, through article 59, of the application of rules/principles in the precedents of the Court in subsequent cases. This would be so because, the dictum could easily be misunderstood when read out of the context in which it was made. It is important to understand that this dictum was not made within the context of the application of a rule/principle adopted in a previous case. Rather, the Court was considering whether it had the power to render purely declaratory judgments. The question the Court was answering was whether: “the abstract character of the decision asked for is ... compatible with article 59 of the Court’s Statute”.⁵ The paragraph preceding the above dictum, would perhaps throw more light on this point. The Court had said:

there seems to be no reason why States should not be able to ask the Court to give an abstract interpretation of a treaty; rather would it appear that this

³ PCIJ Series A, No. 7, 19

⁴ *Ibid*, pp 18-19

⁵ *Ibid*, p. 16

is one of the most important functions which it can fulfil. It has, in fact, already had occasion to do so in judgment no. 3⁶

This is also obvious from the second limb of the aforementioned dictum. Whatever doubt there may have been on the tenacity of this view was resolved by the same Court in *Interpretation of Judgments 7 and 8*.⁷ In deciding the propriety of the application for interpretation of the judgments, the Court noted that judgment No. 7 was in the nature of a declaratory judgment. The Court relied on the same *Certain German Interest in Polish Upper Silesia* as authority that article 59 does not prevent the Court from reaching a purely declaratory judgment. The Court declared that it,

has had occasion in Judgment No.7 (p.19) [*Certain German Interest in Polish Upper Silesia*] to state its opinion upon the question whether article 59 of the Court's Statute prevents it from rendering purely declaratory judgments; it answered this question in the negative stating that article 59 is simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes.⁸

Though citing the full statement in the *Certain German Interest in Polish Upper Silesia*, the Court in the *Interpretation of Judgment case* did correctly circumscribe the statement to the context of declaratory judgments in which it was made. Therefore, *Certain German Interest in Polish Upper Silesia* only served as authority for the legal conclusion that the Court is able to make purely declaratory judgments.

Consequently, it is erroneous to apply the statement, which was made in an entirely different and unrelated context in *Certain German Interest in Polish Upper Silesia* to the authority of judicial decisions in article 38(1)(d). This is particularly in view of the further clarification offered by the *Interpretation of Judgments 7 and 8*. Perhaps it is this realisation that accounts for why the statement has been sparingly cited by the ICJ and has never been followed by the

⁶ *Ibid*, p. 18-19

⁷ *The Chorzow Factory, Series A No. 13*

⁸ *Ibid*, p. 20-21

Court. There is only one instance in the case-law of the ICJ where it has cited the statement. That was in the application of Italy to intervene in *Libya v. Malta*.⁹ While considering the application of Italy to intervene, the Court declared:

In the first place, the rights claimed by Italy would be safeguarded by Article 59 of the Statute.... It is clear from the ... provision that the principles and rules of international law found by the Court to be applicable to the delimitation between Libya and Malta, and the indications given by the Court as to their application in practice, cannot be relied on by the Parties against any other State. As the Permanent Court of International Justice observed, "the object of Article 59 is simply to prevent legal principles accepted by the Court in a particular case from being binding also upon other States or in other disputes" (*Interpretation of Judgments 7 and 8*) P.C.I.J., Series A, No. 13, p. 21).¹⁰

As was the case in *Certain German Interest in Polish Upper Silesia*, where the statement was first made and the *Interpretation of Judgments 7 and 8* which was being cited, the contentious issues in Italy's application to intervene did not have any bearing on the applicability or otherwise of a rule/principle previously adopted. Italy, and indeed Malta and Libya, all made it clear in their submissions that Italy's application was not only to insulate her interest from the decision of the Court but also for Italy to be made a party to the case for the purpose of becoming bound by the decision in accordance with article 59. In other words, what was in contention was whether Italy should be permitted to intervene to protect her interest in spite of the protection afforded by article 59. Neither Italy nor the original parties to the case raised the question of the application of rules/principles before the Court. It was in the context of the protection of third parties that article 59 came into focus in the case and not in the context of the prohibition of rules/principles. For the avoidance of doubt, Italy had stated in her application that she would submit to such decision as the Court may make with regard to the rights claimed by Italy, "in full conformity with the terms of Article 59 of the

⁹ *Continental Shelf (Libya Arab Jamahirija/Malta), Application of Italy to Intervene*, ICJ Rep 1984, 3

¹⁰ *Ibid*, p. 26, para 42

Statute of the Court”.¹¹ It thus follows that, as in the *Certain German Interest in Polish Upper Silesia*, the Court, with due respect, had gone too far away from the issues submitted to it for adjudication to the extent that the pronouncement of the Courts on the prohibition of principles cannot merit much legal weight.

One way of rationalising the pronouncement of the Court in Italy’s application to intervene is to assume that the Court was considering principles purely within the context of delimitation. The general principle governing delimitation as established in *North Sea Continental Shelf cases*¹² is that delimitation must proceed on the agreement of the parties or on the application of equitable principles.¹³ This general rule applies to all maritime delimitation disputes. This is different from the principles governing the actual delimitation between the parties. There are: the equidistance principle; the natural prolongation principle; the straight base line principle; among others. In application, each of the principle leads to different results depending on the geographical configuration of the maritime areas.

Accordingly, principles of delimitation adopted by the Court are the real decisions of the Court in delimitation cases; the actual delimitation is nothing more than the consequence of application of the principles. And given that the geographical configurations of States are not identical, the Court has always exercised caution when dealing with equitable principles applicable to delimitation. In order to avoid inequitable results, the Court adopts principles to govern delimitation on a case by case basis depending on the geographical configuration of the areas in issue. This is more so that third States which share a common maritime boundary with the litigating States can, by agreement with one of the litigating States, apply a different principle from that applied by the Court.

¹¹ See the *Separate Opinion of Judge Keba Mbaye*, *ibid*, p. 37

¹² *Federal Republic of Germany v. Denmark/Netherlands*, ICJ Repts 1969, 3

¹³ By equitable principles, the Court aims at a just and equitable share and not to give a decision *ex aequo et bono* in accordance to article 38(2) of its Statute. (*ibid*, p. 48, para 88)

It is, therefore, likely that it was in relation to the principle of delimitation to be adopted between Libya and Malta that the Court spoke of article 59. This is particularly highlighted by the fact that Libya and Malta had specifically requested the Court in article 1 of the special agreement, to determine “the principles and rules of international law” applicable to the delimitation of the area of the continental shelf which appertains to them.¹⁴ They also requested the Court to determine “how, in practice, such principles and rules can be applied by the two Parties in this particular case”.¹⁵ It logically follows that the principles found to be appropriate for the parties in accordance with their special agreement, is not binding on Italy which was neither a party to the agreement nor to the case in Court.

If article 59 was being applied to principles in this narrow sense, the Court should have been mindful of the confusion its reliance on *Interpretation of Judgments 7 and 8* would create. By relying on the dictum in that case, the Court appeared to have endorsed the view that article 59 prevents principles adopted in one case from application in another.

This was the light in which Judge Robert Jennings responded to the statement of the Court. Jennings made it clear that he was not in agreement with the view that the object of Article 59 is to prevent legal principles accepted by the Court in a particular case from being binding in other disputes. He reasoned that the idea that Article 59 protects third States' from previously adopted principles is at least illusory.¹⁶ In his view, article 59 applies more particularly to the *dispositif* of a judgment, which are addressed only to the parties to the case. He further reasoned that it was in this technical sense that Italy will certainly be protected. And that it would be quite wrong to suggest otherwise.¹⁷

As rightly pointed out by Jennings there is a clear difference between principles (reasoning) and the decision in decided cases. This distinction must be maintained for article 59 to be

¹⁴ *Continental Shelf (Libya v. Malta), Merit*, ICJ Rep 1985, 13, 16 para 2

¹⁵ *Ibid*

¹⁶ *Jennings, Dissenting in Libya v. Malta*, note 9, p. 157, para 27

¹⁷ *Ibid*

well understood. Article 59 protects non-parties only against the decision in a case and not the principles (reasoning) or rules emanating from the decision. As shown in chapter four, the latter is a seamless part of the Court's reasoning process when faced with factual similarities. To use the words of Judge Tanaka, it is through reasoning that the Court contributes to the development of international law.¹⁸ On the whole, the operative part is restricted by article 59 to the actual parties to a case, the reasoning is not. It is therefore true that the Court decides upon claims submitted to it "with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute".¹⁹

These views are consistent with the definition of the terms judgment and decision by the court in *LaGrand* case.²⁰ Here the Court said:

The question arises as to the meaning to be attributed to the words "the decision of the International Court of Justice" in paragraph 1 of this Article. This wording could be understood as referring not merely to the Court's judgments but to any decision rendered by it, thus including orders indicating provisional measures. It could also be interpreted to mean only judgments rendered by the Court as provided in paragraph 2 of Article 94.²¹

It is therefore important to emphasise that Article 59 does not in any way prohibit principles previously adopted by the Court from having binding effect both on the Court and litigating States. Rather the article prohibits the application of the operative part of a judgment – the actual decisions in the case – to a third party. This view conforms to the view expressed by the Inter-Allied Committee on the future of the PCIJ, that:

What it [article 59] means is not that the decisions of the Court have no binding effect as precedents for the court or for international law in general, but that they do not possess the binding force of particular decisions in the relations between countries who are parties to the statute. The provision in question in no way prevents the court from treating its own judgments as

¹⁸ *Separate Opinion in Barcelona Traction Light and Power Co. Ltd (Belgium v Spain), Preliminary Objections*, ICJ Rep 1964, 6, 65-66

¹⁹ *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v The United States) Jurisdiction*, ICJ Rep 1984, 302, 431, Para 88

²⁰ (Germany v. United States), ICJ Rep 2001, 466

²¹ *Ibid*, p. 506, para 108

precedents.... It is important to maintain the principle that countries are not 'bound' in the above sense by decisions in cases to which they were not parties....²²

The reasoning of the Court possesses an inherent attribute of judicial authority and is clothed with intrinsic authoritative characteristics which cannot be affected by article 59. This point was practically demonstrated by Judge Shahabuddeen in *Phosphate Lands in Nauru*, as follows:

it might be contended that the conclusion reached in the judgment could in logic be extended to New Zealand and the United Kingdom; but this would be a matter of extending the reasoning of the Court to a case to which its judgment *per se* does not apply.... A decision in this case, if, as I think, it does not *per se* constitute a judicial determination of the responsibility of New Zealand and the United Kingdom, can at best have only precedential value in any proceedings concerning their responsibility.²³

The weight of principles previously adopted would be less obvious unless this distinction is acknowledged and maintained in the controversies surrounding article 59.

The view taken in the *Certain German Interest in Polish Upper Silesia case* is further discredited by the fact that the Court has not only persistently affirmed, but has also consistently applied rules/principles adopted in previous cases to a different dispute involving different parties. A few cases would buttress this point.

In *Readaptation of the Mavrommatis Jerusalem Concessions*,²⁴ the Court held that, it saw no reason to depart from the construction adopted in its previous judgments, the reasoning of which was still sound.²⁵ Though it may be argued that the parties in PCIJ judgments no 3 and 5 in which the construction referred to was adopted and the one in the *Mavrommatis Concession case* were the same, the relevance of the approach of the Court in this case lies in the fact that the above dictum was made to resolve a contentious issue bordering on the

²² Note 2

²³ *Separate Opinion, (Nauru v. Australia), Preliminary Objections*, ICJ Repts 1992, 261, 297-298.

²⁴ (*jurisdiction*) PCIJ Judgment No. 10, PCIJ Series A. No.11

²⁵ *Ibid*, p. 18

application of a precedent. Also though the parties were the same, the cases and the issues in contention were not the same.

Of stronger significance in this regard, is the view of the ICJ in *Land and Maritime Boundary between Cameroon and Nigeria*, also within the context of deciding on a contentious question of whether a particular precedent was applicable. The Court held that:

It is true that, in accordance with Article 59, the Court's judgments bind only the parties to and in respect of a particular case. There can be no question of holding Nigeria to decisions reached by the Court in previous cases. The real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases.²⁶

This position of the Court was variously cited and followed in the *Second Genocide case*,²⁷ wherein a crucial question also depended on the application of a precedent. The Court variously affirmed that the real question was whether there was a reason for it not to follow such previous principles. On one occasion, the Court affirmed:

The two Parties further agree that the position adopted by the Court in those cases does not have the force of *res judicata* in the present case, because those Judgments were rendered in different cases which did not involve the same parties. The Parties however recognize that these findings have great bearing for the present case, as the Court does not depart from its settled jurisprudence unless it finds very particular reasons to do so.²⁸

In the light of the above, it seems very unlikely that if what the PCIJ was faced with in the *Certain German Interest in Polish Upper Silesia* was the application of a previously adopted rule/principle, the Court would simply have dismissed the rule/principle on the basis of article 59. Of course, there is no reported case where the Court dismissed a precedent on the basis of article 59, without more. Rather, as has been shown in chapter four, the Court has continuously relied on reasons extraneous to article 59 (but intrinsic to the judicial

²⁶*Preliminary Objections*, ICJ Reps 1998, 275, 292 para 28.

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Preliminary Objections*, ICJ Rep 2008, 412

²⁸ *Ibid.*, p. 435 Para 71

lawmaking) to justify why a rule/principle in a precedent is not applicable. In other words, the question is never whether rules/principles in precedents are legally viable; it is always whether they are factually applicable.²⁹

Could it not also be correct to say, therefore, that the fact that both the Court and the States that appear before it make serious legal issues out of whether the Court should depart from a rule/principle previously adopted goes to strengthen the argument that such rule/principles are potentially applicable to all similar cases, rather than weaken the argument? Thus, the weight of rules/principles adopted by the Court could be tested by the way States relate with them. It is unarguable that States litigate in the Court fully aware that the Court would not lightly depart from its case law; neither can it be disputed that they come before the Court in expectation of the application of its case-law. Accordingly, such States regard rules/principles adopted by the Court as the law in respect to the questions in which they were adopted. To that extent, it could be concluded that States regard the rules/principles to be binding on them.

It follows that when States argue on the basis of a precedent, they do not consider themselves to be engaging in a mere academic exercise. They argue on the basis of the rules/principles contained therein and the Court decides on the same basis, because the litigating States and the Court know that the cases contain rules/principles that would resolve the conflict one way or the other. The Court affirmed this view in *second Genocide case*, where it declared:

... here the Parties are not merely citing previous decisions of the Court which might be regarded as precedents to be followed in comparable cases. The previous decisions cited here referred to the question of the status of a particular State, the FRY, in relation to the United Nations and to the Statute of the Court; and it is that same question in relation to that same State that requires to be examined in the present proceedings at the instance, this time, of

²⁹This, perhaps, is why John O' Brien *International Law* 92-93 (2001 Cavendish Publishing, Australia), argued that this statement in *Certain German Interest case* should be regarded with caution in view of the practice of the Court itself.)

Croatia. It would require compelling reasons for the Court to depart from the conclusions reached in those previous decisions.³⁰

The manner in which States relate with rules/principles adopted by the Court and adjust their relations to conform thereto cannot only be assessed in relation to live litigations before the Court.

There have been known instances where States have modified their activities in recognition of the effects of a rule/principle adopted by the Court in cases to which they were not parties. In *Cameroon v. Nigeria*,³¹ it was acknowledged that States reacted to the interpretation adopted in the *Right of Passage over Indian Territory*,³² by modifying their declaration of acceptance of compulsory jurisdiction to expressly exclude a declarant whose declaration had not been transmitted to them. In the *Barcelona Traction case*, Judge Armand-Ugon³³ demonstrated how the rule adopted in *Israel v. Bulgaria*³⁴ would affect Spain which was not a party to that case but had a treaty relation (having a compromissory clause) with Bulgaria. In *Malaysia v. Singapore*,³⁵ it was admitted before the Court that the Foreign Office and Colonial Office in London, which were involved in a wider examination of issues relating to territorial waters, accepted that the *Fisheries case*³⁶ introduced new methods of defining territorial waters. And that Singapore would gain very little from the application of the new principles. Also, in the *Aegean Sea Case* the Court stated:

³⁰ Note 27, p. 429, Para 54

³¹ Note 26

³² (*Portugal v. Indian*), *Preliminary Objections*, ICJ Rep 1957, 125

³³ *Dissenting*, note 18, p.154-155. Also see the *Separate Opinion of Judge Gros* in, *Barcelona Traction Light and Power Co Ltd (Belgium v. France) Second Phase*, ICJ Rep 1970, 3, 267, para 1. (Stating the “importance of the case [at hand] from the point of view of its consequences on the law applicable to international economic relations”)

³⁴ *Aerial Incident of July 27th 1955, Preliminary Objections*, ICJ Rep 1955, 127

³⁵ *Sovereignty over Pedra Branca/Palau Batu Puteh, Middle Rocks and South Ledge*, ICJ Rep 2008, 12, 80-81, para, 225

³⁶ (*United Kingdom v. Norway*) ICJ Rep 1951, 116

Although under Article 59 of the Statute ‘the decision of the Court has no binding force except between the parties and in respect of that particular case’, it is evident that any pronouncement of the Court as to the status of the 1928 [General Act for the Pacific Settlement of International Disputes], whether it were found to be a convention in force or to be no longer in force, may have implications in relations between States other than Greece and Turkey [Parties to the present proceedings].³⁷

It may be that rules/principles adopted by the Court are optional for States which are not in litigation before the Court, and thus of limited applicability. However its limitation (should this be so), it does not detract from the fact that it is binding as law for at least States which are within the Court’s jurisdictional net and which are potential subjects of the rules/principles. Though there is still that possibility that the Court may overrule a particular rule/principle and decide differently.

In concluding this aspect of the work, it is important to reiterate that the assertion in the cases mentioned above, that article 59 prohibits the application of principles adopted in one case from application in another case does not truly capture the essence of article 59. This is because, neither in the cases in which the assertion was made, nor in any other case, has the Court accepted and applied the proposition as the correct interpretation of article 59.

In the next section we shall discuss how the Court applies article 59 to protect third States from decisions – the operative part of a case. No doubt, this discussion shall throw more light on the point already made above.

6.2.2. Article 59 and Third Party Rights

This is the manner in which article 59 has most frequently been used, and arguably, the most important. Here the Court employs article 59 in the opposite direction to protect States from decisions given in cases to which they were not parties. Its importance in this regards lies in the voluntary nature of the jurisdiction of the Court. In municipal systems, Courts generally

³⁷ ICJ Rep 1978, 3, 17-18 para 39

have compulsory jurisdiction over persons and properties within the province of their territorial jurisdiction. The corollary of this compulsory non-consensual jurisdiction of municipal courts is the power to compel the joinder of persons, whose presence is necessary to the complete resolution of a dispute before the Court. Accordingly, municipal courts have the power to join a necessary party either on the court's own motion or on the application of a party to the case or on the motion of the individual to be joined. The consensual nature of the jurisdiction of the ICJ directly limits its power of joinder only to the permissible means of intervention in articles 62 and 63. These articles allow for third party intervention. It is in keeping with this that the ICJ acknowledges that it lacks the power, comparable with that exercised by national courts, which enables national courts to order, *proprio motu*, the joinder of third parties who may be affected by the decision to be rendered.³⁸

In consequence, the ICJ cannot compel a State to appear before it; not even by way of intervention.³⁹ In *Land, Island and Maritime Frontier Dispute*,⁴⁰ the Court declared that there is no process under international law "for joinder of a new party, or parties, whether as applicant or respondent, by move of the Court itself".⁴¹ The same view was maintained in *Nicaragua v. the United States*, where the Court held that there is no trace, either in its Statute or in the practice of international tribunals, of an indispensable parties rule, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings.⁴²

The logic of the position taken by the Court above flows from the stipulation in article 59 that decisions of the Court are binding only on the parties to the case. This, in effect, means that

³⁸ *Phosphate Lands*, note 23, p. 260, para 53

³⁹ *Ibid*

⁴⁰ *El Salvador/Honduras, Application to Intervene*, ICJ Rep. 1990, 92

⁴¹ *Ibid*, p. 134 para. 99, citing with approval the statement of the Court in the *Libya v. Malta*, note 9, p. 25 para 40, that there is, "the absence in the Court's procedures of any system of compulsory intervention, whereby a third State could be cited by the Court as a party to proceedings". The Court also approved of the view expressed in *Nicaragua v. the United States*, note 19, p. 431 para 88.), that the Court does not possess the power "to direct that a third State be made a party to proceedings".

⁴² *Ibid*, p. 431, para 88

decisions are not binding on non-parties to a case. In *El Salvador v. Honduras*, the Court reasoned that “it should be borne in mind that it would hardly be possible, given article 59 of the Statute ... for a decision of the Court to ‘trench upon’ the legal right of a third State”.⁴³ Accordingly, any decision of the Court which affects the interests of a third State is of no effect since it is unenforceable against that State. Therefore, the Court must, as of necessity, ensure that its decision in any particular case does not affect a stranger to the case in which that decision was made.

The unenforceability of a judgment against a third party is not peculiar to the international system; it arises in national jurisdictions as well. In national jurisdictions, the problem is solved by courts exercising the power of joinder, by which a third party is joined to the proceedings. Once such a third party has been joined, the judgment of the court becomes binding and enforceable against the third party. Since as earlier stated, the ICJ lacks this power, it resorts to the provisions of article 59 which prohibits the Court, by implication, from passing on the rights of third parties. This point was succinctly made by Judge Shahabuddeen in his Separate Opinion in the *East Timor case*,⁴⁴ as follows:

Reflecting a view generally held in municipal law, Article 59 of the Statute of the Court provides ... But it does not follow that the Court is free to determine a dispute between parties in entire disregard of the implications of the decision for the legal position of a non-party. Under one form or another of an "indispensable parties" rule, the problem involved is solved in domestic legal systems through an appropriate exercise of the power of joinder. The Court lacks that power; and the right of intervention, or to institute separate legal proceedings where possible, is not always a sufficient safeguard. Hence, when situations arise in which the requested judgment would in fact, even though not in law, amount to a determination of the rights and obligations of a non-party, the Court is being asked to exercise jurisdiction over a State without its consent. *Monetary Gold Removed from Rome in 1943* says it cannot do that.⁴⁵

⁴³Note 40, p. 130 para 90

⁴⁴(*Portugal v. Australia*), ICJ Rep. 1995, 90

⁴⁵*Ibid*, p. 119

In essence, article 59 is a command to the Court not to make a decision against a third party. But should the Court exceed the circumference of the legal interests of the parties before it to make a decision that undermines the rights of a third party, that decision is unenforceable against the third party. This is because article 59 makes the decisions of the Court binding only on the parties to a case.

To avoid handing down unenforceable decisions, the Court has severally used article 59 as a bulwark over the legal interests of third parties. In *Libya v. Malta*,⁴⁶ Italy sought the permission of the Court to intervene in the case which was brought by a special agreement between Libya and Malta, in respect of a dispute concerning the delimitation of the continental shelf between the two States. Italy contended that her legal interest would be affected by the decision of the Court. Because Italy sought to intervene as a party to the case under article 62 of the Statute of the Court, she undertook to conform to the judgment of the Court, if granted permission to intervene. In its decision, the Court admitted that Italy had a legal right to protect through intervention, but that the right was already automatically protected by article 59 of its Statute. The Court further assured Italy that its judgement on the merit, between the actual parties, will not merely be limited in its effects by article 59 of the Statute, but that it will be expressed, upon its face, to be without prejudice to the rights and titles of third States.⁴⁷ In *Burkina Faso v. Mali*,⁴⁸ a Chamber of the Court had to determine, as a preliminary point, whether it could adjudicate concerning a part of the frontier between the parties without infringing the rights of Niger, which was not a party to the proceedings. This followed the argument of Mali that the tripoint implicating Niger, Mali and Burkina Faso cannot be determined between the two Parties without Niger's agreement; nor can it be determined by the Chamber. The Chamber held that, in accordance with Article 59 of the

⁴⁶Note 9

⁴⁷*Ibid* p. 26-27, para. 43

⁴⁸*Frontier Dispute* ICJ Repts 1986, 554

Statute, its Judgment will not be opposable to Niger as regards the course of that country's frontiers.⁴⁹ This, according to the Chamber, was because the rights of Niger were safeguarded by the operation of article 59 of the Statute of the Court.⁵⁰ The Chamber further declared that the safeguarding of the rights of States in cases to which they are not parties, “is the whole point of ... Article 59 of the Statute”.⁵¹ This is further buttressed by *Libya v. Malta*, where the Court declared that, by the effect of article 59, its judgment would be binding only upon the Parties, but would be relative and non-opposable to Italy and that she would in no way be bound by the operative provisions of that judgment.⁵²

This clear and practical application of article 59 in the case-law of the Court can only strengthen the point already made above that the essence of article 59 is to protect third parties from decisions and not principles.

6.2.2.1 The Limits of Article 59 Protection

The case-law of the Court reveals instances where article 59 is unable to effectively protect third party interests.⁵³ Generally, Judge Mbaye reasoned in *Libya v. Malta*, that depending on the nature of the rights at issue and the possible consequences of the Court's decision, there may be situations in which article 59 may offer only an imperfect protection to a third State. He defined the situation to be where the Court's decision might cause irreparable harm to a third State; such as where the decision attributes specific rights to one or the other of the parties.⁵⁴ Accordingly, the protection afforded by article 59 is not without limits.

The Court has so far developed the approach best suited to situations where third States would require more protections than article 59 can render. As a result, it has strived to strike a

⁴⁹ *Ibid* p. 579-580 para 50

⁵⁰ *Ibid* p. 577, para 46

⁵¹ *Ibid*, p 579 para 49

⁵² Note 9, p. 16, para 22

⁵³ In *Land and Maritime Boundary between Cameroon and Nigeria, Equatorial Guinea Intervening*, ICJ Rep 2002, 303, 421, para 238, the Court specifically identified maritime delimitation pertaining to the maritime areas of several States in this regards. The Court specifically held that article 59 may not be able to protect Equatorial Guinea and Sao Tome and Principe from the effects of the Judgment between Cameroon and Nigeria.

⁵⁴ *Separate Opinion, Libya v. Malta*, note 9, p. 46-47

balance between the necessity not to prejudice the rights of third States and the corresponding necessity of adjudicating on the case between States which have voluntarily submitted to its jurisdiction in expectation of a decision. In *Libya v. Malta*, the Court declared that it is its duty, in the absence in the Court's procedures of any system of compulsory intervention, to give the fullest decision it may give in the circumstances of each case while the legal interests of a third State is protected.⁵⁵

A rough assessment of what the Court would do to balance the protection afforded third parties by article 59 against the equally important right of litigating States to be heard by the Court, has been to identify some limits beyond which it would be judicially imprudent to decide on a dispute which implicates third party rights. That limit is reached where, to follow the language of the Court, the legal interests of the non-party would not merely be affected by the judgment, but would constitute its very subject-matter.⁵⁶ In other words, that limit is reached when the judgment the Court is called upon to render would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case.⁵⁷ It must be appreciated, though, that this balance may be very difficult to achieve in some cases without having to pass on the legal rights of third parties⁵⁸ or declining to decide on some crucial aspects of the claim between the parties, even after the Court had considered it proper to assume jurisdiction over the case.⁵⁹

On the whole, it is as pointed out by Judge Shahabuddeen, difficult to think of any point at which a balance may be struck between these competing considerations without the Court

⁵⁵ Note 9, p. 25 para 40

⁵⁶ *Phosphate Lands in Nauru*, note 23, p. 312-313, para 79-80

⁵⁷ *East Timor*, note 44, p. 102, para 29

⁵⁸ See *Armed Activities on the Territory of the Congo (DRC v. Uganda)*, ICJ Rep 2005, 168, 237 para 203; *Phosphate Lands in Nauru*, note 23 p. 261-262 para 54-55. In these cases the Court assumed jurisdiction despite finding the existence of the interests of third States in the claims brought before it.

⁵⁹ In *Libya v. Malta*, note 14, the Court tactically severed the part of the claim affecting the interest of Italy from the dispute between Libya and Malta. See a critique of the approach of the Court in the Separate Opinion of Judge Shahabuddeen, in *Phosphate Lands in Nauru*, *ibid*, p. 294-295, where he reasoned that the position taken by the Court was not merely to protect Italy's interests, but was in fact refraining from adjudicating between the parties before it with respect to any areas in which Italy might have a claim.

having sometimes to assume jurisdiction notwithstanding that the interests of a non-party State would, to some extent, be affected. It is pertinent to state, nonetheless, that whenever this occurs, it becomes the province of article 59 to limit the effect of the judgment to the actual parties to the case. This is because the extent envisaged by Judge Shahabuddeen could only be the extent to which article 59 can still effectively protect third States. The Court accepts that it is legally impermissible for it to make a decision affecting third States without their consent. The Court would avoid making a vain order.

The Court would reach the point where third party interest cannot be left to article 59, when the interest of the third State forms the subject-matter of the claim before the Court. Whenever the Court finds that the balance tilts against the protection afforded by article 59, and the affected State refuses to intervene, the Court would have no other choice than to decline jurisdiction. This was the approach followed by the Court in *Monetary Gold Removed from Rome in 1943*,⁶⁰ *East Timor*⁶¹ and *Northern Cameroon*.⁶² In *Monetary Gold*, the Court refused to adjudicate on the claim brought by Italy against France, the UK and the U.S (on the basis of an agreement between the three States) because, though Albania's share of the monetary gold formed the subject-matter of the case, Albania was not a party to the proceedings. The Court specifically held that it could not determine the case in the absence of Albania consenting to jurisdiction, as that "would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the Court can only exercise jurisdiction over a State with its consent".⁶³ In *East Timor*, the Court also declined jurisdiction because Indonesia whose treaty rights with Australia formed the basis of the decision requested by Portugal was not a party to the case. The reasoning of the Court was that, inasmuch as Australia's behaviour cannot be assessed without first deciding on why

⁶⁰ *Preliminary Question*, ICJ Reps 1954, p. 19

⁶¹ Note 42

⁶² (*Cameroon v. United Kingdom*), *Preliminary Objections*, ICJ Rep 1963, 15

⁶³ *Monetary Gold case*, note 60, p. 32

Indonesia could not have lawfully concluded the 1989 Treaty between Australia and Indonesia (the very subject-matter of the Court's decision), it could not make such a determination without the consent of Indonesia.⁶⁴ In *Northern Cameroon*,⁶⁵ the Court would not adjudicate on the claims of Cameroon because the subject-matter of the claim was the conduct of the United Nations which was not a party to the proceedings. Another reason the Court declined jurisdiction was that the Judgment would materially affect Nigeria, which was not a party to the proceedings and to which the erstwhile Northern Cameroon had been assimilated by a plebiscite conducted under the supervision of the United Nations.

The point made here is that though article 59 protects the interests of third parties from decisions in a case, there could be instances where the protection afforded by article 59 may not suffice. In such instances, the Court simply declines jurisdiction. The only way the Court can decide such cases is when the affected State intervenes in the case.

6.2.2.2 Article 59 and Intervention

The point where the relationship between article 59 and the intervention provisions – articles 62 and 63 – coincide is that point where the Court is prevented from adjudicating on a dispute affecting the legal rights of States that have not consented to the proceedings. As has been said above, the Court lacks the power to cause the joinder of a State in a pending suit, without her consent. The only remedy for this problem manifested in *East Timor*; *Monetary Gold*; and *Northern Cameroon*, is the intervention of the interested States in the respective applications. If there had been a successful application to intervene, the decision would have been binding upon the intervening parties. This would have plugged the gap between the decisions in each of the cases and the relevant third party by making them parties upon which decisions are binding under article 59. Where, as was the situation in those cases, a third State

⁶⁴Note 44, p. 102, para 28

⁶⁵Note 62

refuses to intervene, the State remains outside the purview of article 59 and is effectively insulated from the decision of the Court.

It must be borne in mind, though, that the protection afforded third States by article 59 is not diminished or extinguished by the failure of a State to intervene after being notified of the pendency of the proceedings. The consensual nature of international adjudication completely removes every notion of *estoppel* in this regard. It is, therefore, entirely within the prerogative of a State to decide whether it wants to participate in an ongoing proceeding in which the State considers its interest to be at stake. In *Monetary Gold*⁶⁶ and *East Timor*,⁶⁷ each of the respective respondents – Albania and Indonesia – which must have been aware of a pending case in which her interests may be prejudiced, refused to intervene in the proceedings. This, notwithstanding, the Court would not adjudicate on the claims in their absence. It was particularly argued in *Monetary Gold case* that the inclusion of the provisions for intervention indicates that the Statute contemplated that proceedings may continue, notwithstanding, that a third State may have an interest of a legal nature which might enable it to intervene. From this, the conclusion was sought to be drawn that the failure of a third State to exercise its choice of intervention should not make it impossible for the Court to give judgment on rights as between the Parties. Rejecting this contention, the Court held that, “the Statute cannot be regarded, by implication, as authorizing proceedings to be continued in the absence of Albania [and by extension, non-intervening States]”.⁶⁸

Indeed, the difficulty the Court had in the cases in which it had tilted the balance in favour of adjudicating on the claims of the litigating parties has been the failure of a third party, whose interest is at stake, to intervene. In *Cameroon v. Nigeria*, for instance, though the Court held that it had jurisdiction to determine the claims submitted to it, the Court yet had a problem

⁶⁶ Note 60

⁶⁷ Note 44

⁶⁸ Note 60, p. 32

with the aspects of the claim touching on the rights of Equatorial Guinea and Sao Tome and Principe. This was owing to the fact that Equatorial Guinea only intervened as a non-party intervener⁶⁹ while Sao Tome and Principe did not intervene at all.

In the case, Nigeria had urged the Court to decline jurisdiction because the decision in the case would affect the interests of Equatorial Guinea and Sao Tome and Principe. The Court acknowledged that the interests of those States were actually at risks; but being unable to determine the questions raised as a preliminary question, the Court deferred it to the merit stage because it could not “rule out the possibility that the impact of the judgment required by Cameroon on the rights and interests of the third States could be such that the Court would be prevented from rendering it in the absence of these States”.⁷⁰ At the merit stage, the Court acknowledged that, its jurisdiction being founded on the consent of the parties, it is prevented from deciding upon the legal rights of States which were not parties to the proceedings. The Court agreed that the rights of third States – Equatorial Guinea and Sao Tome and Principe – might indeed be affected by the proceedings; and that those rights cannot be determined by a decision of the Court unless Equatorial Guinea and Sao Tome and Principe decided to intervene. Consequently, the Court refused to rule on Cameroon's claims in so far as they might affect rights of Equatorial Guinea and Sao Tome and Principe, though the Court assumed jurisdiction over the case.⁷¹

The approach is consistent with the case-law of the Court which holds that the failure of a necessary third State to intervene does not preclude the Court from assuming jurisdiction

⁶⁹ Note 53. A non-party intervener is an intervening State which does not want to become a party to the proceedings before the Court and as such not bound by the judgment of the Court under articles 59 and 60. Such a State is allowed to intervene only for the purpose of clarifying her legal interests that may be affected by the proceedings before the Court. The request of Equatorial Guinea to intervene, as granted by the Court, “was for her to intervene as a non-party only to inform the Court of her rights and interests so that these may remain unaffected” – *Land and Maritime Boundary between Cameroon v. Nigeria, Application to Intervene*, ICJ Rep. 1999, 1029, 1031, 1032, para 2 and 5. Also See *El Salvador/Honduras*, note 40, p. 135-136, para. 102. (Holding that a non party intervener neither becomes a party nor acquires any rights which attaches to the status of a party under the Statute and Rules of Court, or the general principles of procedural law.)

⁷⁰ Dissenting, *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria, Preliminary Objections*, ICJ Rep 1998, 275, 324, para 116

⁷¹ Note 221, p. 421 para 238

over a claim. Indeed such instances abound. In *Phosphate Lands in Nauru*,⁷² the Court held that the absence of a request for intervention by a relevant third State does not preclude the Court from adjudicating upon the claims submitted to it, provided the legal interests of a third State which may possibly be affected do not form the very subject-matter of the decision that is applied for. This is however subject to the fundamental qualification that the Court is able to render a decision that does not affect the right of third States. Or as seen in the *Libya v. Malta* in relation to the right of Italy; *Cameroon v. Nigeria* as it affected the rights of Equatorial Guinea and Sao Tome and Principe, the Court would dutifully avoid pronouncing on the aspect of the case affecting the rights of the non-intervening third State while generally assuming jurisdiction over the case.

Accordingly, when the Court states that it can adjudicate on a case in which the interest of a third State may be affected, the Court could not be saying that it is acceptable to give a decision affecting the interest of a third State which had not intervened. What the Court is entitled to say (and this is obvious from the cases) is that it cannot refuse to adjudicate on a case because the legal interest of a third State may be affected when the effect of the decision on such a third State had been negated before hand by article 59. In other words, the Court simply holds that it is not obliged to take any additional steps in cases where article 59 provides adequate protection.

There is, therefore, a difference between cases where only the interest of a third State is affected and cases where in addition to the interests of the State being affected, the conduct of the State or its interest forms the very subject-matter of the case. Where the latter is the case, it would not be sufficient that the interests of the State is protected by article 59, the Court would require the consent of the third State to the proceedings. Where the State refuses to

⁷²Note 20, p. 261 para 54. Also see *Certain Property, (Liechtenstein v. Germany)* ICJ Rep 2005, 6. Judge Elaraby accused the Court of misapplying the previous cases and thus deviating from its jurisprudence – dissenting, *Phosphate Lands in Nauru*, id, p. 42-43

supply that consent through intervention, the jurisdiction of the Court is vitiated not only in relation to the third party but also in respect of the case in its entirety. The Court affirmed this view in the *Monetary Gold case*; declaring as follows:

Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.⁷³

The Court further held that although Italy and the three respondent States had conferred jurisdiction upon the Court, that jurisdiction was not exercisable in the absence of Albania, whose interest formed the subject-matter of the claim.⁷⁴

6.2.2.3. Intervention as Alternative to Article 59

It is essential to mention that the extent of the power of the Court over whether to grant intervention or not, is dependent upon the article under which the application is brought. If brought under article 63, the Court is bound to grant it. But if it is brought under article 62, the Court is not bound to grant it as of course.⁷⁵ In addition to the stipulations in article 81(2) of its Rules, the Court takes into account article 59 in relation to the interests sought to be protected, in deciding whether to grant the application.⁷⁶ The Court has been consistent in stating that it does not consider that article 62 of the Statute confers upon it any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. Rather, the task entrusted to it by article 62 is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute.⁷⁷ Indeed, as the Italian application to intervene in the *Continental Shelf case* shows, the fact that a State

⁷³ Note 60, p. 33

⁷⁴ *Ibid.*, p. 33

⁷⁵ See *S.S. Wimbledon Application Instituting Proceedings of January 16, 1923*, Serie A. No. 1, for the differences between articles 62 and 63. Here, an application which would not succeed under article 62, succeeded under 63.

⁷⁶ Article 81(2) of the rules of Court specify what the Court should consider in an application for intervention to be: (a) the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case; (b) the precise object of the intervention; (c) any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case.

⁷⁷ *Continental Shelf (Tunisia v. Libya), Application of Malta to Intervene*, ICJ Rep 1981, 3, 12 para 17

actually has an interest of a legal nature to protect in an ongoing case, is not a guarantee that its application to intervene under article 62 would be granted by the Court.

This approach of the Court presents article 59 as a more effective alternative to intervention in a case in which the Court can reach a decision within the ambit of the protection afforded by the article. Accordingly, article 62 intervention begins where the protection afforded by article 59 ends. *Libya v. Malta*⁷⁸ would illustrate this point. In the judgment of the Court on the application to intervene, the Court rejected the application of Italy to intervene because the interest it sought to protect was protected by article 59. While stating its judgment on the merit, however, the Court stated that the decision on the merit as foreshadowed in its decision on application to intervene was that the decision would be limited in geographical scope so as to leave the claims of Italy unaffected. Accordingly, the decision of the Court was confined to the area in which, as Italy informed the Court, she had no claims to continental shelf rights.⁷⁹

This could further be explained by *Nicaragua v. the United States*.⁸⁰ In the case, Nicaragua had brought proceedings against the United States of America, in respect of a dispute concerning responsibility for military and paramilitary activities in and against Nicaragua. The US challenged the jurisdiction of the Court on several grounds, including the absence of Honduras, Costa Rica and El Salvador in the proceedings. This argument was based on a reservation in the Declaration by which the US accepted the compulsory jurisdiction of the Court. In its response, the Court held that the three States had the choice of either instituting proceedings or intervening for the protection of their interests, “in so far as these are not already protected by Article 59 of the Statute”.⁸¹

This view was further highlighted by Judge Jennings, who though disagreeing with the position of the Court, maintained that he was,

⁷⁸ Note 14, p. 13

⁷⁹ *Ibid*, 26, para 21

⁸⁰ *Nicaragua v. United States*, note 19, p. 421, para 67

⁸¹ *Ibid*, p. 425, para. 75

unable to accept the argument, nor indeed does the Court appear to accept, that this reservation is "mere surplusage", and that it does no more than protect the interests of absent States already protected by Article 59 of the Statute. No doubt both that Article and the reservation are concerned with States not parties to the case; but I am unable to see how an instrument which protects those States from being bound by the decision can be said to cover the same ground as one which reserves jurisdiction unless those States are parties.⁸²

The Court's reliance on article 59 as a ground for rejecting an application to intervene under article 62 was, however, not well received as a ground for rejecting the application of Italy to intervene in *Libya v. Malta*. In the case, Italy had trenchantly argued that:

If Article 59 always provides adequate protection for third States, and if the protection which it affords is such as to prevent the interest of the third State from being genuinely affected in a pending case, then... Article 62 no longer has any point whatsoever, nor any sphere of application.⁸³

In answering this contention, the Court declared that the conclusion drawn by Italy was unfounded. It affirmed that a State which considers that its legal interest may be affected by a decision has the choice – implied in the provision of Article 62, that a State "may" submit a request to intervene – whether to intervene or to refrain from intervening, and rely on Article 59.⁸⁴

Being dissatisfied with the manner in which the Court placed article 59 over the deliberate choice of Italy not to rely solely on article 59, but also to intervene under article 62, Judge Schwebel stated that there would never be a case to which article 62 could apply, if by reason of article 59, a third State's legal interest never can be affected by a decision in a case. The Judge reasoned that article 59 cannot, by any canon of interpretation, read Article 62 out of the Statute.⁸⁵ Mbaye reasoned that the preference placed by the Court on article 59 over

⁸² *Separate Opinion, Nicaragua v. United States, ibid*, p. 554

⁸³ Note 9, p. 26, para 42

⁸⁴ *Ibid*

⁸⁵ *Dissenting, ibid*, p. 134, para 9

article 62 was tantamount to condemning the institution of intervention, provided for in article 62 of the Statute, to a “wasting death”.⁸⁶

Notwithstanding, the Court’s use of article 59 and intervention in the alternative conforms to the view expressed in the M. Leon Bourgeois Report to the League Council, when the Statute of the Court was being considered. After discussing article 59 in the context of intervention, the Report concluded that:

The last stipulation [in article 61 now 63] establishes, in the contrary case, that if a State has not intervened in the case the interpretation cannot be enforced against it. No possible disadvantage could ensue from stating directly what article 61 indirectly admits. The addition of an article drawn up as follows can thus be proposed to the assembly: *The decision of the court has no binding force except between the parties and in respect of that particular case.*⁸⁷

It therefore appears perfectly in order for the Court to decline an application to intervene under article 62 when the legal interest for which intervention is sought is already protected by article 59.

The discussion in the section strongly shows that the Court takes seriously to the view that article 59 protects third parties from decisions – the operative part of a case. When the approach of the Court in the cases discussed in this section is contrasted with its approach in the cases in which the Court postulated that article 59 prohibits principles adopted in one case from application in another, it would lend credence to the point earlier made about the weight to be attached to the mere statements about article 59 prohibiting the application of principles. The differences in the approaches of the Court in these regards lie in the fact that in cases where it was said that article 59 prohibited principles, the application of principles was not in issue. The statement was not crucial to the resolution of a live question of law or of facts raised in the cases; it therefore lacked application. Accordingly, the utility of the

⁸⁶ *Separate Opinion, ibid*, p. 54

⁸⁷ Article 8 – Right of Intervention – in the Report presented by the French Representative, M. Leon Bourgeois and Adopted by the Council of the League of Nations at its Meeting at Brussels on October 27th 1920. See Documents presented to the Committee Relating to the Existing Plans for the Establishment of a Permanent Court of International Justice, p. 32, 50

statement is at best academic. On the other hand, in the cases where the Court applied article 59 to decisions, the question of application of decisions to third States were crucial in the cases. By the application of article 59 the Court was enabled to resolve the question one way or the other. This cannot but show that the correct view is that article 59 means exactly what it says – decisions (not principles) are binding only on parties to a case.

The writer stated at the beginning of this section that when article 59 is for the protection of third States, the article is actually used in the opposite direction. This is because the rule that third parties cannot be bound by the decision of the Court is actually the inverse of the express provision of the article. The next section discusses instances where the Court relied on the express provision of article 59.

6.2.3 For the Purpose of Holding Parties to a Case Bound by the Decision in the Case

Article 59 is sometimes used to complement article 60 of the Statute. By article 59, judgments are binding on the parties; by article 60 judgments are final and not appealable.

Under this head, article 59 expresses the trite law that decisions of a tribunal, be it a judicial or other tribunals, are binding only on the parties to the cases before it.⁸⁸ By reading both articles together, the Court emphasises the finality of its judgments between the parties. In *Free Zones of Upper Savoy and the District of Gex*, the PCIJ declared that it is incompatible with the character of the judgments rendered by the Court and with the binding force attached to them by articles 59 and 60 of its Statute, for the Court to render a judgment which either of the parties may render inoperative.⁸⁹ In *Northern Cameroons*, the Court specifically declared that “pursuant to Article 59 of the Statute, a judgment of the Court in this case would bind only the two Parties”⁹⁰ – Cameroon and the United Kingdom. In the *Monetary Gold case*, the

⁸⁸ *Dissenting Opinion of Judge Hackworth in Effects of Awards of Compensation made by the United Nations Administrative Tribunal*, ICJ Rep 1954, 47, 81

⁸⁹ (2nd Phase) Order of December 6, 1930, 14

⁹⁰Note 60, p. 34

Court thought the rule in article 59 “rests on the assumption that the Court is at least able to render a binding decision”.⁹¹

This use of article 59 is clear from its wordings that “the judgment of the Court is binding on the parties”; so that parties which approach the Court do so in expectation of a binding decision in respect of the dispute for which they are in Court. The decision being binding and final cannot be reopened except in accordance with the provisions of the Statute. Accordingly, it is not open to a party to a case to deny that the decision of the Court in the case is binding. The point was emphatically made in *LaGrand* case,⁹² where the Court stated that:

the object and purpose of the Statute is to enable the Court to fulfil the functions provided for therein, and, in particular, the basic function of judicial settlement of international disputes by binding decisions in accordance with Article 59 of the Statute.⁹³

It seems, however, that for a decision to have a binding effect between the parties under article 59, it must be a final decision within the meaning of article 60. In *Free Zones of Upper Savoy and the District of Gex*, the Court held that the orders made by it under article 48 of its Statute in contradistinction with the judgments of the Court have no “binding” force (article 59) or final effect (article 60) in deciding the dispute brought by the parties before the Court.⁹⁴ Also, in his dissenting opinion in the *Interpretation of Judgments 7 and 8*, Judge Anzilotti noted that, by articles 60 and 59, judgments of the Court on preliminary matters do not have the binding force of a decision for the purpose of interpretation. He maintained that it is,

clear under a generally accepted rule which is derived from the very conception of *res judicata*, [that] decisions on incidental or preliminary

⁹¹ Note 60, p. 33

⁹² (Germany v. United States), ICJ Rep 2001, 466

⁹³ *Ibid*, p. 502, para 102

⁹⁴ Order of August 13, 1929, series A. No. 22, p. 13

questions which have been rendered with the sole object of adjudicating upon the party's claim ... are not binding in another case.⁹⁵

The rule that preliminary orders are not binding appears to have been overruled in *LaGrand* case,⁹⁶ where the Court unequivocally affirmed the binding nature of preliminary orders. Notwithstanding, the two positions of the Court could be reconciled by arguing that article 59 applies to final and not tentative orders. The difference being that though preliminary orders are binding, the Court could change its view in the course of a particular case.⁹⁷ And since the preliminary determination is not final and, therefore, not *res judicata* until the case is determined with finality (though binding), the Court would not require a request for revision under article 61 before revising a preliminary decision, whereas, the revision of a final judgment can occur only through article 61. It thus follows that decisions on preliminary matters are binding as decisions under article 59 though not final under article 60. To that extent, it could be said that not all decisions which are binding under article 59 are final. This is particularly so because, article 59 does not produce finality of judgment, it only produces the binding effects of a decision between the parties.⁹⁸

What has been said above is only an aspect of the combined use of articles 59 and 60. There is the other half of it that makes it impossible for parties to a case which had been decided with finality, to re-litigate the same matter between the same party in another case. This is known as the principle of *res judicata*. This is the aspect of article 59 which shall be discussed in the next section.

⁹⁵ Note 7, p. 26

⁹⁶ Note 92, p 506, para 108

⁹⁷ *South West cases (Ethiopia v. South Africa; Liberia v. South Africa), 2nd Phase, ICJ Rep 1966, 6*. See pages 130-131 above. Cf. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Rep 2007, 43; see pages 121-126 above.

⁹⁸ See *Separate Opinion of Keba Mbaye, Libya v. Malta*, note 9, p. 39 (alluding to "the binding effect produced by article 59 of the Statute").

6.2.4 Article 59 as *Res Judicata*

Article 59 had been variously used to affirm the application of the rule of *res judicata* in the Court. The Court holds this view through a conjunctive reading of articles 59 and 60. The latter article provides that “The judgment of the Court is final and of no appeal...”. In the *South West Africa cases*,⁹⁹ Judge Jessup affirmed, in his Separate Opinion, that the statement in Article 60 of the Statute that “the judgment is final and without appeal”, taken in conjunction with the reference in article 59 to “that particular case”, constitutes a practical adoption in the Statute of the rule of *res judicata*.¹⁰⁰ According to Judge M. Anzilotti,

The first object of article 60 being to ensure, by excluding every ordinary means of appeal against them, that the Court’s judgment shall possess the formal value of *res judicata*, it is evident that the article is closely connected with article 59 which determines the material effect of *res judicata*we have here [in article 59] the three traditional elements for identification, *persona, petitum, causa petendi*, for it is clear that “the particular case” ... covers both the object and the grounds of the claim.¹⁰¹

The doctrine of *res judicata* rests on the fundamental notion that there should be an end to litigation. Consequently, parties are not allowed to re-litigate issues which they failed to raise in a previous case: when the parties; issues; and subject matter, are the same. According to the ICJ in the first *Genocide case*:

The fundamental character of that principle [*res judicata*] appears from the terms of the Statute of the Court and the Charter of the United Nations. The underlying character and purposes of the principle are reflected in the judicial practice of the Court. That principle signifies that the decisions of the Court are not only binding on the parties, but are final, in the sense that they cannot be reopened by the parties as regards the issues that have been determined, save by procedures, of an exceptional nature, specially laid down for that purpose. Article 59 of the Statute, notwithstanding its negative wording, has at its core the positive statement that the parties are bound by the decision of the Court in respect of the particular case. Article 60 of the Statute provides that the judgment is final and without appeal... Two purposes, one general, the other specific, underlie the principle of *res judicata*, internationally as nationally. First, the stability of legal relations requires that litigation come to an end. The Court’s function, according to

⁹⁹ *Ethiopia v. South Africa, Preliminary Objections*, ICJ Rep 1962, 319

¹⁰⁰ *Ibid.*, p. 332

¹⁰¹ *Dissenting, in the Interpretation of the Judgment 7 and 8*, note 7, p. 23

Article 38 of its Statute, is to “decide”, that is, to bring to an end, “such disputes as are submitted to it”. Secondly, it is in the interest of each party that an issue which has already been adjudicated in favour of that party be not argued again. Article 60 of the Statute articulates this finality of judgments.¹⁰²

The Court further held, citing article 59 of the Statute, that *res judicata* signifies that once a Court has made a determination, that determination is definitive both for the parties, in respect of the case; and for the Court itself in the context of that case.¹⁰³

Nonetheless, a finding of *res judicata* does not preclude a party to the case from advancing a legally distinct claim arising from the same facts; neither does it completely remove the subject-matter from the examination of the Court. In other words, the fact that a State had made a claim on one legal basis does not deprive it of the right to assert another claim on a separate legal basis regarding the subject-matter. The question will then arise whether the issue raised in the latter claim was finally determined by the earlier decision¹⁰⁴ – *res judicata* feeds on finality.

For the Court to be entitled to make a finding of *res judicata* in the context of its Statute and the submissions of the parties, the Court follows the practice of national courts: there must be an identity of parties;¹⁰⁵ identity of cause; and identity of subject-matter between the earlier and the subsequent proceedings.¹⁰⁶ In his analysis of article 59 in the *Interpretation of Judgments no. 7 and 8*, Judge Anzilloti stated that the aforementioned requirements of *res*

¹⁰² Note 97, p. 44 para 115 – 116. it also held that “subject to the possibility of revision, the applicable principle is ... that the findings of a judgment are, for purposes of the case and between the parties, to be taken as correct, and may not be reopened”. – p. 46 para 120

¹⁰³ *Ibid*, p. 53 para 138

¹⁰⁴ *Dissenting Opinion of Judges Ranjava, Shi and Koroma in Second Genocide case*, note 24, p. 268, para 4.

¹⁰⁵ While reviewing the relevance of the decisions in the first *Genocide case*, note 97, and *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, *Preliminary Objections*, ICJ Rep 2004, 1307, to the *second Genocide case*, *ibid*, the Court held that though some of the legal issues dealt with in the former cases arise in the latter, the issues were not *res judicata* because the parties were not the same under article 59 of the Statute of the Court. (p. 17 Para 53

¹⁰⁶ *Dissenting Opinion of Judges Ranjava, Shi and Koroma*, note 104

judicata are encapsulated in article 59. He saw article 59 as clearly an expression of *res judicata*.¹⁰⁷

Article 59 confines the *res judicata* effect of the decision of the Court to the actual parties and to finality of decisions. However, a party which had the opportunity to defend a suit against it but yet refused to participate in the proceedings will be precluded from reopening the case, except within the context of article 61 of the Statute.¹⁰⁸ This point was made in *Military and Paramilitary Activities in and against Nicaragua*.¹⁰⁹ Here, after the Court dismissed her preliminary objections, the United States refused to participate further in the proceedings. While delivering judgment on the merit, the Court made it clear, relying on article 59, that:

A State which decides not to appear must accept the consequences of its decision, the first of which is that the case will continue without its participation; the State which has chosen not to appear remains a party to the case, and is bound by the eventual judgment in accordance with Article 59 of the *Statute*.¹¹⁰

This view should however be situated within the context of a respondent, which had refused to appear or decided to boycott a case after an initial appearance, notwithstanding that the Court was properly seised of jurisdiction. The statement does not apply to a State which had not accepted the jurisdiction of the Court; or one which had accepted the compulsory jurisdiction of the Court but not a party to a particular case before the Court.

The extensive discussion of the principle in the first *Genocide case* by Judge *ad hoc* Kreca, is particularly illuminating and worth summarising. According to Judge Kreca, the expression, *res judicata*, has more than one meaning: it means an issue decided by a court of law; a judgment which cannot be refuted by ordinary legal vehicles; and, also, a decision which is

¹⁰⁷ Note 7, p. 27

¹⁰⁸ Article 61 allows a State to apply for revision of a judgment

¹⁰⁹ (*Nicaragua v. the United States*), Merit, ICJ Rep 1986, 14, 24 Para 28

¹¹⁰ *Ibid*

immutable and irrevocable. To him, two components may be discerned in the substance of *res judicata* as provided in the Statute of the Court: (i) procedural, which implies that: “[t]he judgment is final and without appeal. In the event of a dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party (Art. 60)”; and (ii) substantive, according to which: “The decision of the Court has no binding force except between the parties and in respect of that particular case (Art. 59)”. The Judge opined that the primary effect of *res judicata* in the procedural sense is to preclude a future lawsuit on the same cause of action, whereas the effect of *res judicata* in the substantive sense is mainly related to the legal validity of the Court’s decision as an individualization of objective law in the concrete matter and also, to the exclusion of the application of *stare decisis*.¹¹¹

On the exclusion of *stare decisis* as a substantive meaning of *res judicata*, however, not even on the facts of the case, could the Judge sustain his view. Hence he quickly realised that it is clearly established in the case-law of the Court that the effects of a decision of the Court are not necessarily limited to the case decided, and that depending on circumstances, it occasionally extends beyond it.¹¹² On this basis, the Judge concluded that a “[n]arrow interpretation of Article 59 simply does not fit into the corpus of the Court’s law”.¹¹³

It was only logical that the Judge accepted that article 59 should not be narrowly interpreted, as he soon came to a point in his Opinion that would shred his earlier view. This was when he came to the main consideration before the Court – the effect of two existing earlier judgments of the Court. The one made at the preliminary stage of the first *Genocide case* and the one made in a set of different cases entirely – the *Legality of the Use of Force cases*. The kernel of the Judge’s concern was the effect of the judgments of the Court in the cases on the United

¹¹¹ Separate Opinion of Judge Kreca in *first Genocide case*, note 97, p. 1, para 1-3

¹¹² *Ibid*, p. 26, para 49; In the *Aerial Incident of August 10 1999 (Pakistan v. India)*, Jurisdiction, ICJ Reps 2000, 12, 24 para 26, the Court adopted this passage from the *Aegean Sea (Greece v. Turkey)* ICJ Rep 1978, 3, stating that it would proceed on a similar course adopted by the Court in that case, where having noted that the decision may have implications for other cases, refused to decide on whether the General Act was still in force.

¹¹³ *Separate Opinion of Judge Kreca in first Genocide case*, note 97, p. 493, para 50

Nations, and by extension, its members at large, given that the vital issues in the cases revolved around the United Nations, which was not a party to the case. If the Judge took the view that the precedential value of the decisions of the Court had been excluded by the *res judicata* effect of article 59, it would mean that the approach adopted by the Court previously on the same issue of the status of FRY (Serbia and Montenegro) in the United Nations would have no application in any other case between FRY and another member of the United Nations. This would mean that the Court is at liberty to hold that FRY is a member of the UN in one case, but not in another. The wider implication may even be that FRY would relate with some States as a member of the United Nations and with some other States as a non-member. Accordingly, each member of the United Nations would have to individually approach the Court to determine its relationship with FRY *vis a vis* the United Nations. This would greatly be at the expense of judicial economy and a massive waste of time and resources. In any case, where would that leave the Court and the parties appearing before it? If the Court took the view that the precedential force of a judgment was not precluded by article 59, the Court would allow the United Nations to take cognisance of the judgment which would in turn produce the desired judicial force between Yugoslavia, on one side, and the UN and its members on the other. The Judge rightly preferred the latter view, which is a prudent use of judicial resources. In his words:

...the Judgment cannot, in that part, be treated as a judgment *in personam*, having conclusive effects only between the parties to the case, because its subject matter is the status of Serbia and Montenegro both in relation to the United Nations itself and in relation to the Members of the United Nations....¹¹⁴

The Judge then concluded:

¹¹⁴*Ibid*, p. 494, para 51

Judgments of the Court on the status issue, in their effect *ratione personae*, cannot, unlike other judgments, be limited to the Parties to a dispute. Their material effects surpass the effects of the judgment defined in Article 60 of the Statute. By the very nature of their object, judgments on status issues, which do not allow for uncertainty and insecurity, act *intra partes*. ... However, this is not a question of the technical effect, under Article 59 of the Statute, of judgments on status issues *intra partes* but a question of the material, reflective effect of such judgments on third States. It is binding *erga omnes* not as a judicial act in the formal sense, but as a result of its intrinsic persuasive force, in parallel with the mandatory force of the judgment in the technical sense, based on the presumption of truthfulness....¹¹⁵

The distinction of status and non-status judgments sought to be introduced into article 59, is with respect, unpersuasive. The Judge was embarking on an unwarranted legislative trip by attempting to write into the Statute of the Court a clause that is not there. Nonetheless, the reasoning of the learned Judge does show the complexities that would arise should article 59 admit of such technical restriction.

It should be clear from the discussion above that *res judicata* only applies to the actual decisions of the Court between the parties and not the reasoning of the Court leading to that decision. In *Barcelona Traction case*, Judge Gros thought that the force of *res judicata* does not extend to the reasoning of a judgment, and that it is the practice of the Court, as of arbitral tribunals, to stand by the reasoning set forth in previous decisions.¹¹⁶ Accordingly, *res judicata* is not synonymous with the doctrine of judicial precedent. For a claim to be *res judicata*, it must have been previously determined with finality between the same parties. Precedent on the other hand, only requires similarity of facts; it neither requires similarity of subject-matter nor similarity of parties.

¹¹⁵ *Ibid*, p. 497, para 58

¹¹⁶ *Separate Opinion*, note 33, p. 267, para 1. Also see Ernest A. Young, 'Supranational Rulings as Judgments and Precedents' 18 DJCIL 476, 500-502 (2008) (arguing that "Just as courts exercise both dispute settlement and law-declaring functions, their decisions can be authoritative in two corresponding ways: as judgments and as precedents. Within the domestic legal system, the judgment force of a court's prior decision is expressed through the rules of ... *res judicata*. ... The precedential force of a ruling ... refers to the ruling's authoritative force in a new proceeding not encompassed by the prior judgment."); Iain Scobbie, "Res Judicata, Precedent and the International Court of Justice: A Preliminary Sketch", 20 Aust. YBIL 229, 303 (1999) (stating that *res judicata* refers to the terms of the definitive disposition of a specific case as between the parties, as stated in the operative clause. While the doctrine of precedent concerns relatively abstract proposition which may be used in future cases, which need not involve the same parties.)

In the first *Genocide case*, Judge Owade, in effect, reasoned that though a judgment does not technically constitute *res judicata* for other cases to which article 59 of the Statute applies, it is relevant for the Court to consider whether and to what extent the legal reasoning enunciated by the Court in arriving at its conclusion in that judgment is applicable to those other cases¹¹⁷ This was also the view of the Court in the *Legality of the Use of Force*,¹¹⁸ where, referring to the judgment in *first Genocide case*, the Court declared:

There is no question of that Judgment possessing any force of *res judicata* in relation to the present case. Nevertheless, the relevance of that judgment to the present case has to be examined, inasmuch as Serbia and Montenegro raised, in connection with its Application for revision, the same issue of its access to the Court under Article 35, paragraph 1, of the Statute....¹¹⁹

Therefore, it is the live issues decided in a case that could be *res judicata* and not the rule/principle arising from the case. Thus, issues raised by the parties and decided by the Court are *res judicata* between the parties, but a rule/principle arising from the case has a life of its own. Such a rule/principle could subsequently be questioned by the parties to the case in which it was adopted (or by a different party) in an entirely different case. The fact that the rule/principle could be successfully revised in another case has no relevance to the earlier case where the rule/principle was used to decide with finality. That earlier case cannot be reopened simply because the Court decided to take a different view of the law in a different case, since the issues decided in the previous case are, by articles 59 and 60, final between the parties and, therefore, *res judicata*.

So far, the writer has discussed the various aspects of article 59 in the case-law of the Court. It has been shown that article 59 has no real bearing with article 38(1)(d). This being the case, to what end is the latter article subject to the former. It is to this, that the writer shall now turn.

¹¹⁷ Separate Opinion, note 97, p. 8, para, 287.

¹¹⁸ Note 104, p. 1307.

¹¹⁹ *Ibid*, p. 1338, para 78

6.3 The Purport of Subjecting Article 38(1)(d) to Article 59

It is an incontrovertible rule of interpretation that a provision made subject to another is intended to be read alongside whatever limitation is placed on it by that other provision. It thus follows that article 38(1)(d), having been made subject to article 59, must be read together with the latter for the purpose of observing the limits placed thereon by the latter. The mere fact that article 59 is inherently ambiguous makes it impossible for paragraph (d) to escape ambiguity. Accordingly, no conclusive statement can be made on paragraph (d) without observing the limits, if any, placed thereon by article 59.

It would be incontrovertible that if article 59 prohibited the Court from adopting and applying legal rules/principles developed in previous decisions, article 38, being so subject, would be construed accordingly. But if as has been shown above, article 59 is not so construed in the case-law of the Court, it would follow that the authority of judicial decisions is unaffected by the provisions of article 59 in the manner in which the provisions have been generally construed by writers.¹²⁰

The first point to note is that paragraph (d) contains two items— judicial decisions and teachings – but only judicial decision is mentioned in article 59. The first difficulty is whether the phrase, “subject to”, governs only judicial decisions or the entire paragraph, including teachings of Publicists. If it governs the entire paragraph, which is the only plausible view, because of the conjunctive “and” between decisions and doctrines, one would be left wondering what doctrine has to do with an article 59 provision. If this view is given, it would rob article 59 of its acclaimed essence, if its purpose is actually to prohibit the accumulation of case-law. Hence, we cannot talk of the application of a particular teaching of publicists,

¹²⁰ See, for instance, Maurice Mendelson, “The International Court of Justice and the Sources of International Law” in Vaughan Lowe and Malgosia Fitzmaurice ed. *Fifty Years of the International Court of Justice* 63, 81 (Cambridge University Press, 1996). (Arguing that the effect of subjecting article 38(1)(d) to article 59 is that there is no doctrine of judicial precedent in the ICJ).

“between the parties and only in respect of that particular case”. The simpler view, on the face of it, is to hold that the phrase governs only judicial decisions. This view is also not free from complications.

The major complication arising from this is the general belief that article 38(1)(d) encompasses decisions of other international courts and tribunals, as well as municipal courts. If the term “subject to article 59”, is the decisive factor, it would then follow that the decisions of these other courts and tribunals which are not made subject to article 59, are not affected by article 59. The effect of this would be that the precedents of these other courts would have greater force in the ICJ than its own precedents. According to Mohamed Shahabuddeen,

Article 38 paragraph (1)(d) refers to “judicial decisions in general and unqualified terms. This must include decisions of tribunals other than the International Court of Justice. It is equally clear that the provisions article 59 relate only to the International Court of Justice... if the purpose of article 59 were “to prevent decisions of the court from exerting precedential effect with binding force”, it would follow that “the decisions of other courts and tribunals presumably stand on higher ground, not being caught by the article 59 limitation. The consequence of this is so improbable as to suggest that the interpretation on which it rests cannot be correct.¹²¹

It is difficult to see how the Statute of the Court would require the Court to accord greater authority to decisions of other courts than its own decisions.

The second complication relates to the advisory jurisdiction of the Court. Article 59 is clearly attached to paragraph (d) in article 38(1). Article 38(1) expressly mandates the Court to

¹²¹ Cited in R.Y Jennings, “The Judiciary, International and National, and the Development of International Law” 45, *Int’l & comp. L.Q* 1, 6 (1996). Whether formally required or not, the case-law of the Court must carry the highest weight in matters specifically assigned to it. This point was indirectly made by the Court in *Ahmadou Sadio Diallo (Guinea v. DRC)*, Judgment of November 30, 2010, p. 14, para 66, where, considering the provisions of the International Covenant on Civil and Political Rights, 1966, the Court had to rely on the case-law of the Human Rights Committee set up under the Covenant, the Court stated that, though it was not obliged to model its view on that of the Committee, “it believed it should ascribe great weight to the interpretation adopted by this independent body established specifically to supervise the application of that treaty. The point here is to achieve ... clarity and the essential consistency of international law, as well as legal security, to which both the individuals with guaranteed rights and the States obliged to comply with treaty obligations are entitled”. By the same token, it should be supposed that the Court is bound to attach the greatest weight to its precedent in matters within its competence.

decide; and “decisions” as used in article 59 and the opening paragraph of article 38(1) and in its paragraph (d), relates to the contentious jurisdiction of the Court under article 36. In contradistinction to this, the Court is not required to “decide” in its advisory jurisdiction. Also, there are no parties to be bound by advisory opinions within the language of article 59 and no *res judicata* can result from the issues upon which the Court has pronounced an opinion in its advisory capacity.

Furthermore, article 65 is not made subject to article 59, and it cannot be rightly argued that article 59 has any nexus with article 65. From the language of article 59, it can be gathered that the article is concerned with the jurisdiction of the Court in contentious cases – brought by disputant State parties who are bound by article 94 of the Charter of the UN – and not advisory opinions, to which there are no contentious parties, and thus not binding on any State. Article 59, therefore, has no bearing with article 65.

Notwithstanding, when searching for previously determined rules/principles, the Court does not draw any distinction between decisions rendered under each form of jurisdictions, neither does the Court attach lesser authority to rules/principles arising from its advisory jurisdiction.

According to Judge *De Castro*, advisory opinions,

...do not carry less authority than its judgments. There is ... a difference, stemming from the *vis res judicata* of the judgments, but this is limited to the parties to the dispute (*vis relativa*: Statute, Art. 59). On the other hand, the reasons on which judgments are based (Statute, Art. 56) are considered to constitute *dicta prudentium*, and their force as a source of law (Statute, Art. 38) derives *not* from any hierarchic power (*tantum valet auctoritas quantum valet ratio*) but from the validity of the reasoning (*non ratione imperio, sed rationis imperio*). The essential differences between judgments and advisory opinions lies in the binding force of the former (Charter, Art. 94) and it is on that account that the Court's jurisdiction was established on a voluntary basis (Statute, Art. 36) and the effect of judgments limited to the parties and the particular case (Statute, Art. 59). However, like the reasons on which a judgment is based, the reasoning and operative part of an advisory opinion are, at least potentially clothed with a general authority, even vis-à-vis States which have not participated in the proceedings, and

may therefore contribute to the formation of new rules of international law (Statute, Art. 38, para. 1 (d)).¹²²

This point has also been made by Judge Tanaka. In his words:

...concerning the Advisory Opinion of 1950, it has no binding force upon those concerned, namely no *res judicata* results from an advisory opinion for the purposes of subsequent litigation, even if the issue is identical. This point constitutes a difference between advisory and contentious proceedings. The structure of the proceedings is not the same, and the concept of parties in the same sense as in the latter does not exist in the former. This legal nature of an advisory opinion does not prevent that, as an authoritative pronouncement of what the law is, its content will have an influence upon the Court's decision on the same legal issue, irrespective of whether or not this issue constitutes a part of a subsequent stage of the same affairs.¹²³

The fact that the Court has exercised its advisory jurisdiction to develop international law as much as it has used its contentious jurisdiction is incontrovertible,¹²⁴ as some of the far-reaching rules/principles handed down by the Court have been in advisory opinions. For instance, the possibility of international organisations possessing the personality to bring international claims was first recognised in *Reparation for Injuries Suffered in the Service of the United Nations*.¹²⁵

If article 59 was to prohibit precedent, it would have also been directed towards advisory opinions, except it could be argued that the Court is only precluded from judicial legislation in contentious cases. Since the Court attaches the same weight to rules/principles arising from both forms of jurisdiction, it would have been expected that article 59 would target judicial precedent irrespective of jurisdictions. The unspoken implication of arguing that article 59 prohibits the application of rules/principles arising from judicial decisions is to place the

¹²² *Separate Opinion, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, ICJ Rep 1971, 16, 173-174, para 4

¹²³ Dissenting, *South West Africa cases*, note 99, p. 260. In the same vein, Judge Winiarski declared in *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion*, ICJ Rep 1950, 65, 91, that although advisory opinions are not legally binding, the Court must attribute to them great legal value.

¹²⁴ See Edvard Hambro, "The Authority of the Advisory Opinions of the International Court of Justice", 3 Int'l & Comp. L.Q. 2 (1954) (noting that the legal reasons behind advisory opinions carry the same weight and are invested with the same high authority as judgments).

¹²⁵ ICJ Rep 1949, 174

authority of rules/principles in advisory opinions over and above rules/principles in contentious cases. This result is untenable.

The situation becomes more complicated when it is considered that the advisory jurisdiction of the Court is, in some cases, binding on parties as would contentious jurisdiction. Such provisions are numerous contained in treaties¹²⁶ and have been construed and applied in several cases.¹²⁷ In totality, it would thus hardly be true that article 38(1)(d) is made subject to article 59 for the purpose of preventing binding rules/principles adopted in the Court's decided cases.

With these complexities, it is difficult to state, with precision, for what reason paragraph (d) was made subject to article 59. This is particularly due to the fact, as we have already seen, in chapter two, that article 59 was discussed in its drafting stages only in the context of intervention. No doubt, the nebulous language of article 38(1)(d) accounts for the perennial controversy trailing the authority of judicial decisions in article 38(1)(d).

In totality, it is really difficult to see where the argument that article 59 prohibits the application of rules/principles adopted in one case to another, can be anchored. Such a view neither finds support in the preparatory work nor in the Court's interpretation and application of article 59. Considering the fact that the tenacity of the tentative conclusion reached in chapters three and four is dependent on the conclusion to be reached in this chapter, it is only prudent to say that the purpose of subjecting article 38(1)(d) to article 59 has remained largely unexplained both in the case-law of the Court and in the preparatory work of the

¹²⁶ See article 66 para 2 Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations, ILM 543 (1986); article 32 para 3, United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 28 ILM 493 (1989). See Generally, Roberto Ago, "Binding Advisory Opinions of the International Court of Justice" 55 Am. J. Int'l L. 439 (1991)

¹²⁷ *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, ICJ Rep 1999, 62

provisions. This is particularly more intriguing when it is discovered that article 59 has been used more in conjunction with articles 60, 62, and 63 than with article 38(1)(d).

It may be that those who inserted the provision were worried over the use of the word “decision” in the draft presented to the League Council by the Advisory Committee of Jurists. Their concern may be that article 38 could be used to smuggle a decision against third party if the word, “decision,” was not further restricted to the actual parties by article 59. It may also be that article 38(1)(d) was subjected to article 59 in response to the view of Mr. Balfour, the British Representative, in his submission to the League Council. He had submitted:

It seems to me that the decision of the permanent court cannot but have the effects of gradually moulding and modifying international law. This may be good or bad ...there ought to be some provision by which a state can enter a protest, not against any particular decision arrived at by the court, but against any ulterior conclusions to which that decision may seem to point.¹²⁸

Perhaps, article 59 was the provision envisaged by Balfour; perhaps, one of the unsolved mysteries of the Statute of the Court; perhaps, and according to James Brown, “one of the imperfections of the Court's Statute”.¹²⁹ Though difficult to ascertain the real purpose of subjecting article 38(1)(d) to 59, it is, as the writer has shown in this chapter, not so difficult to understand the working of article 59 and its relationship with article 38(1)(d) in practice.

In the final analysis, this writer is unable to conclude upon a detailed examination of the practice of the Court that article 59 negates the normative character of rules/principles previously adopted by the Court. Those rules/principles are rules/principles of international law until overruled by the Court or expressly excluded by bilateral or multilateral treaties or by an adverse custom.

¹²⁸ Note on the Permanent Court of International Justice, submitted by Mr. Balfour to the Council of the League of Nations, Brussels, October 1920, process verbal, p. 38. He also expressed the fear that States such as the United States, Russia and Germany, which were not members of the League of Nations, cannot be expected to take their views of international law from the Court's decision.

¹²⁹ Introduction to Manley Hudson's World Court Reports vol. 1, p. Xiv, (1934) cited in John C. Gardner, “Judicial Precedent in the Making of International Law”, 17 J Comp. Legis. & Int'l L. 3d ser., 251, 254.

The good news, however, is that whatever theoretical void exists on the issue, that void is cured by the robust practice of the Court, which clearly points article 59 away from the view that its object is to prevent binding rules/principles. The writer is relieved to close this chapter with the sagacious observation of Lauterpacht, that:

the practice of the court shows that if article 59 was intended to stultify the task of the court of developing international law by its own decisions and to prevent it from availing itself of the fruits of such development, then, with the concurrence of all the judges representing various systems of municipal jurisprudence, it has remained a dead letter.¹³⁰

This is indeed a true representation of the findings made above regarding the practice relating to article 59.

¹³⁰ H. Lauterpacht, "The So-Called Anglo-American and Continental Schools of Thought in International Law", 12 Brit Y.B Int'l. L, 31, 60-61 (1931)

Chapter Seven

Occasions for, and Patterns of Judicial Legislation by the International Court of Justice

7.1 Introduction

The main thrust of the writer's work in the previous chapters has been to ascertain the relevance of rules/principles in judicial decisions to the functions of the Court; a function it must perform in accordance with international law. His focus has been on the question whether rules/principles adopted in previous decisions form part of the body of international law which the Court is bound to apply. This is particularly in view of article 59 by which decisions are stated to be binding only on the parties to the case in which they were given.

The writer had firmly argued in the previous chapters that rules/principles in judicial decisions are part of the body of international law in accordance to which the Court is mandated to perform its functions. The writer found no indication to the contrary in the plain language of the Statute of the Court; the preparatory work of the Statute; the practice of the Court and of the States that appear before it. Consequently, the writer trenchantly argued that the language of article 59 has no relevance to the authority of rules/principles adopted in the decisions of the Court.

The main focus of this chapter is on the actuality of the Court developing and creating rules of international law as envisaged in article 38(1)(d) of its Statute. In furtherance of this, the chapter shall discuss the practice of the Court revealing law-creation in the interpretation of treaties; the application of customary laws; and in first impression cases.

7.2 Occasions for Judicial Legislation

The term, “judicial legislation”, is cautiously used by the writer for want of a term that so best describes a function which the Court most often performs: the creation and development of international law.¹ The Court performs this function whenever it adopts new legal solutions to deal with exigencies which are either not expressly provided for in existing rules of international law or are yet to be covered by law at all. For this purpose, the writer sees no real distinction between rules made through the modification and development of existing law to suit novel situations (not hitherto contemplated) and rules created by the Court from the corollaries of general rules/principles or through modification of analogous rules/principles of private law to create rules that are compatible with the international system. The rules emanating through the former are no less judicial creations than the rules emanating from the latter. The bottom-line, however, is that whenever the Court reads into a treaty a new provision under the guise of interpretation, or adopts a legal solution to a novel problem under the guise of finding the law, the Court actually creates a new rule of law. The writer would not share in the “conspiracy to represent it as something less”.²

The writer is well aware of the opposition the term, “judicial legislation”, naturally attracts, when used in relation to a court like the ICJ which operates on the international sphere.³ As discussed in chapter one, aside the famous concept of separation of powers, the traditional

¹ Some writers see it as the exercise of judicial discretion – Christopher A. Ford, “Judicial Discretion in International Jurisprudence: Article 38(1)(c) and General Principles of Law” 5 *Duke J. Comp. & Int’l L.* 35, 35 (1994-1995)

² Hersch Lauterpacht and C.H.M Waldock, *The Basis of Obligation in International Law and other Papers of Late James Leslie Brierly* 98 (Oxford, 1958). (Asserting that the act of a court is law-creating when it ascribes a meaning to a legislative instrument, “in spite of our conspiracy to represent it as something else”.) This conspiracy very much features in the work of many scholars: see for instance, Prosper Weil “The Court Cannot Conclude Definitively ...” *Non Liquet Revisited*, 36 *Colum. J. Transnat’l L.* 109,117 (1998), though insisting that the Court does not legislate but only develops the law (assuming that there is a real difference between lawmaking and developing), he was however willing to admit that the Court is bound to settle disputes for which there are no directly applicable laws, even at “the cost of a liberal approach to the development of law”. Weil however failed to define what he meant by liberal development of law. Neither did he specify its scope. But if taken within the context of his discussion, it would be abundantly clear that he was only trying to disguise judicial legislation.

³ This should be expected. As noted by Christopher Ford, note 1, p. 36, “tension between judges’ creative function and the doctrinal legitimacy of legal rules is a characteristic of any legal system in which norms generally rely for their legitimacy upon institutions or processes that lie outside ... its highest court”.

doctrine that States are the only makers of international law elevates the term “judicial legislation” to a particularly sentimental height sustained by the dogma of State consent. The writer is nonetheless firm in his belief that the dogmatic attachment to the traditional view, even in the face of the constant making and development of law by international judges has made it impossible for full expression to be given to this aspect of the Court’s function in the existing literature. This has also created a general academic apathy towards engaging the literature as an influential corrective framework on the decisions of the Court through constructive evaluation and re-evaluation. In reality, ICJ Judges make laws and would continue to do so as the inseparable incidence of applying law and doing justice. The doctrinal obstacles on the path of a general acceptance of the creation and development of law, in the light of what they really are, has for so long denied, not only the Court, but the international community the invaluable role Scholars should play in guiding the Court and helping it refine its previous decisions and define their scope ahead of the occurrence of analogous situations.

It is conceded, though, that if consent is required for the existence of the rules to be applied by a court, it might follow, as a corollary, that the parties to a controversy would prescribe to the court the rules to be applied. It is also conceded that pieces of judicial legislation are not expressly consented to by States as they would to every piece of treaty to which they are bound. What is not conceded is that rules/principles in judicial decisions are not part of the law prescribed for the Court by States in article 38(1); neither is it conceded that principles adopted in judicial decisions are lacking in State consent, for reasons already explained in chapter two.

It is, for the above reason, less fruitful and less in tune with the practice of the Court to pursue the argument that the ICJ is doctrinally prohibited from exercising the residual lawmaking power that resides in all courts of justice. The inclusion of article 38(1)(c) and (d) in the Statute of the Court is a clear indication that the Court is able to make international law when none exists, and adapt existing rules to changed circumstances. To borrow the words of T.O. Elias, the items contained in article 38(1)(a) and (d) are “useful devices’ to assist if there are difficulties in applying the traditional sources of international law”.⁴

Another crucial factor is the fact that, in practice, States and international lawyers habitually take their view of international law from decisions of the Court. Yet no opposition has been raised in practice about the power of the Court to take a novel and independent view of international law. Be it in the field of treaties and customs, or in areas not previously governed by international law, it is impossible to sustain the argument that the Court is not constantly moulding the law into relevance in the dynamic and progressively sophisticated international environment. In Judge Alvarez’s view, it is the province of the Court to progressively apply international law in a manner that truly captures the essence of the present requirements and conditions of the life of peoples.⁵ Given that in the progressive application of international law, the Court creates new law by modifying classical law,⁶ the fact that the Court makes law when it applies a rule to a different context to that which it was made, is a practical reality which cannot seriously be denied.

Judicial legislation is far from being a reflection of the Judges’ subjective ideas of what society should be. It is a reflection of what society is or has become in the light of the development of the law. As rightly stated by Lauterpacht, the creativity of the judge is not

⁴ T.O Elias, *The International Court of Justice and Some Contemporary Problems*, 1983 p 14 cited in the *Dissenting Opinion of Rosalyn Higgins in Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* ICJ Rep 1996, 226, 592 para 38

⁵ *Dissenting, Advisory Opinion on the International Status of South West Africa*, ICJ Rep. 1950, 128, 177

⁶ *Ibid.* It thus follows that certain amount of authority in the field of lawmaking inherently comes with a court.

necessarily the result of the purely subjective discretion and individual idiosyncrasy. Rather, it may be described as fulfilling what the legislator would have intended if he could foresee the changes occurring in the life of the community.⁷ Perhaps, the reason Bin Cheng sees the judge as “an intelligent collaborator of the legislator in the application of the living law”.⁸

It could be garnered from the view of Judge Ammoun in the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*,⁹ that though the Court does not legislate but declares the law, the Court must not necessarily declare the law as it was made by the law-giver, but it must declare it in line with contemporary trends. In his words, “the Court is not a law-making body. It declares the law. But it is a law discernible from the progress of humanity, not an obsolete law”.¹⁰ This point has also been strenuously made by Judge Alvarez in *Competence of Assembly regarding Admission to the United Nations*,¹¹ where the Judge reasoned that the progressive tendencies of international life beckons on the Court to interpret international law in such a way as to ensure that institutions and rules of law shall continue to be in harmony with the new conditions in the life of the peoples.¹²

Admittedly, it is not conducive to the functions of the Court as a judicial organ to develop and apply rules which do not yet exist in the public conscience of the international community or in the conscience of civilised nations. Reasoning in the same direction, Judge Tanaka declared:

Undoubtedly a court of law declares what is the law, but does not legislate. In reality, however, where the borderline can be drawn is a very delicate and

⁷ Hersch Lauterpacht, *The Development of International Law by the International Court*, 80 (London Stevens & Sons Ltd, 1958).

⁸ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 17 (Cambridge: Grotius Publications Ltd, 1987).

⁹ Advisory Opinion, ICJ Rep 1971, 16.

¹⁰ *Ibid*, p. 72.

¹¹ *Dissenting*, ICJ Rep 1950, 4,

¹² *Ibid*, p. 16. Also see his *Dissenting Opinion in the International Status of South West Africa*, note 5, p. 177.

difficult matter.... We cannot deny the possibility of some degree of creative element in their judicial activities. What is not permitted to judges, is to establish law independently of an existing legal system, institution or norm. What is permitted to them is to declare what can be logically inferred from the *raison d'être* of a legal system, legal institution or norm. In the latter case the lacuna in the intent of legislation or parties can be filled.¹³

*Reparation for Injuries Suffered in the Service of the United Nations*¹⁴ would buttress this point. In this opinion, one of the questions the Court was asked was whether the United Nations could bring an international claim against a State for injuries suffered by employees in the service of the United Nations. Answering this question in the affirmative, the Court relied on the fact that international law already recognised instances of actions in the international sphere by the United Nations.¹⁵ It is apparent from the reasoning of the Court that the legal foothold of that opinion was on its finding that the instances of entities other than States having capacity to act on the international plane were already established in the consciousness of the international community.

With this finding, it was possible for the Court to come to the conclusion that the existence of such organisations exercising some of the rights (including the right to bring international claims), which were hitherto exclusive to States, was an indication of a principle upon which the right of the organisations to exercise certain international law rights (which hitherto also exclusively belonged to States) could be legally constructed. The Court reasoned that the attribution of international personality to the United Nations was crucial to the performance of its international functions. But the Court also understood that the United Nations could not exercise the rights on the same basis as States. Hence, the Court enunciated the “purpose and functions” principle, as a new and different basis on which an international claim, and in particular, a claim of diplomatic protection could be sustained. Accordingly, the United

¹³*Dissenting Opinion of Judge Tanaka in South West Africa Cases (Second Phase)*, ICJ Rep, 1966, 6, 277. Indeed the Court cannot remedy a gap in the law, if in order to do so, it would exceed the bounds of normal judicial actions (*id*, p. 48, para 91)

¹⁴ 1949: ICJ Rep 1949, 174. The recondite question asked the Court related to the capacity of the United Nations to bring international claims. The Court acknowledged that this capacity belonged to States on the basis of sovereign equality. The question then was, whether an international organisation possessed that attribute – international legal personality?

¹⁵ *Ibid*, p 178

Nations is entitled to bring international claims, not on the basis of sovereignty but on the basis of its purpose and functions. It could exercise a diplomatic protection claim on behalf of its employee, not on the basis of nationality of the injured individual, but on the basis of the contractual link between that individual and the international organisation.¹⁶

The point being made was also affirmed by the Court in *Legal Consequences of the Continued Presence of South Africa in Namibia*.¹⁷ Here, the Court declared that it cannot ignore parallel developments in other areas of the law “if it is faithfully to discharge its functions”.¹⁸ Indeed the corollary of taking matters extraneous to a law into consideration in applying that law is the creation and development of law to cover areas in which the law had lagged within the general sphere of its application.

It is, therefore, not to be expected that the Court would go all out to fish for rules independent of the immediate needs of the case before it in order to fill a gap and do justice. The necessity of judicial invention is occasioned only by the failure of the legislature to address the immediate needs of the community which is mirrored by the parties before the Court. Indeed as has been rightly noted:

¹⁶ *Ibid.* This was in contradistinction to the prevailing rule of customary international law which was variously affirmed in the case-law of the Court pre the *Reparation case*. The prevailing rule as first stated in *Panevezys-Saldutiskis Railway*, 1939, series A/B, No. 76, 16 was that “in the absence of a special agreement, it is bond of nationality between the State and the individual which alone confers upon the State the right of diplomatic protection”. The case also established that, “by taking up the claim of one of its subjects ... a state is in reality asserting its own rights....” (p. 17) This was followed by the ICJ in *Nottebohm (Liechtenstein v. Guatemala), (Second Phase)* ICJ Rep 1955, 4, 13 and 24. It is certainty in this realisation that it is undeniable that the Court made a new law in the *Reparation case*. See *The Dissenting Opinion of Judge Alvarez in the Competence of Assembly*, note 11, p. 18, where the Judge stated:

it is possible, by way of interpretation, to attribute to an institution, rights which it does not possess according to the provisions by which it was created, provided that these rights are in harmony with the nature and objects of the said institution. Thus, for instance, in ... the *Reparation for Injuries suffered by the United Nations*, the International Court of Justice declared that, having in view the nature and objects of that institution, it was entitled to claim damages suffered not only by itself but by its agents in the performance of their duties. This Court has therefore attributed to the United Nations a right which was not expressly conferred on that Organization by the Charter and which, according to traditional international law, appertains solely to States. The Court, in so doing, created a right and, as I have already shown, it was entitled to do so.

¹⁷ Note 9

¹⁸ *Ibid.*, p. 31-32, para 53

The role of any judicial tribunal in the development of law must of necessity be a limited one. Much of the law developing function is performed indirectly when the results of the proceedings before it make manifest the inadequacies of the existing legal standards which it is powerless to disregard.¹⁹

This limitation precludes the ICJ from acting in the purely legislative capacity of conceiving and enunciating new rules to govern situations that had not arisen. It is possible for a court to formulate new rules, only when confronted with a practical reality not yet covered by the legislating authority. The writer is mindful of the fact that the ICJ is generally guided by the reluctance of encroaching into the province of the legislature; a reluctance characteristic of all courts. Nonetheless, as Judge Lauterpacht pointed out in the *Admissibility of Hearings of Petitioners by the Committee on South West Africa*,²⁰ the

Reluctance to encroach upon the province of the legislature is a proper manifestation of judicial caution. If exaggerated, it may amount to unwillingness to fulfil a task which is within the orbit of the functions of the Court as defined by its Statute.

In essence, though the Court exercises reluctance, it has not been to the extent of abdicating its duty to decide in any particular case.

The point made above is that judicial legislation does not presuppose a situation where the judge imposes her subjective notion of right and wrong on the international community. And as the cases show, judicial legislation occurs when the Court enunciates or develops legal rules already influenced by the requirements of international life.²¹ This is an aspect of judicial caution which no court, more importantly, international courts, can afford to ignore.

It remains to be said that the fear that it is dangerous for the Court to make law in the absence of a central legislature to correct its errors, is more apparent than real. It was pointed out by Julius Stone that one of the problems of judicial legislation on the international sphere is the

¹⁹ Oliver J. Lissitzyn, *The International Court of Justice. Its role in the Maintenance of International Peace and Security*, 16, (Greenwood Press, Publishers; Connecticut 1978)

²⁰ Separate Opinion, ICJ Rep 1956, 23, 57

²¹ See *Reparation case*, note 14

absence of international legislature capable of correcting pronouncements of the Court as to the applicable law.²² This concern, which was no doubt vital when Stone wrote, has become less significant with the passage of time. It can now be seen that the problem is curable by States acting individually or collectively. If there was a rule emanating from a decision of the Court which did not appeal to a State or group of States, there are a variety of ways of circumscribing the rule from applying to them: a State could circumscribe the rule by persistently opposing the application of the rule to it. In the *Fisheries* case, the Court held that the ten mile rule was not applicable to Norway inasmuch as Norway had always opposed any attempt to apply it to her coast.²³ This is valid for a rule of custom as it is for a rule in the case-law of the Court.

A more practical example of how States could correct an erroneous principle arising from the decision of the Court is manifest in the manner in which a number of States responded to the ruling of the Court in the *Right of Passage over Indian Territory*.²⁴ In the case, the Court established that it is not mandatory for the declaration of the acceptance of compulsory jurisdiction by a new declarant to be transmitted to existing declarants under the optional clause system, for the new declarant to be capable to seise the Court against an existing declarant. The Court gave this interpretation while interpreting article 36(4) of its Statute. Following this decision, States which were unhappy with the interpretation²⁵ amended their declaration to the Optional Clause System to tactically overrule the Court by requiring a timeframe that must lapse before the Court can exercise its compulsory jurisdiction over them in relation to a new declarant. This is to guard against a situation where a new declarant takes

²² Julius Stone, "Non Liqueur and the Function of Law in the International Community" 35 Brit Y.B Int'l Law, 124, 127 (1959)

²³ (*United Kingdom and Norway*), ICJ Rep 1951, 116, 132

²⁴ Preliminary Objections, ICJ Rep 1957, 125

²⁵ Paragraph 1(iii) of the July 5, 2004 declaration of the United Kingdom of Great Britain and Ireland excludes States which deposited their declarations less than 12 months prior to filing an application bringing a dispute. This allows ample time for the Secretary General to transmit the Declaration. The same clause is in the Australian declaration of March 22, 2002, the Nigerian declaration of April 30 1998, the Indian declaration of September 18, 1974, to mention a few.

advantage of the *Right of Passage* precedent (as done by Cameroon against Nigeria) to spring a surprise suit upon the respondent, which being unaware that the applicant had joined the optional clause system, had not contemplated judicial settlement as one of the options open to the applicant. In *Cameroon v Nigeria*,²⁶ Judge Koroma took judicial notice of the fact that *the Right of Passage* judgment prompted some States which had previously made a declaration under Article 36(2) of the Statute to take measures to protect themselves against the institution of surprise proceedings by introducing further reservations into their declarations, in addition to reciprocity.²⁷

The same result could be brought about through a resolution of the General Assembly or the Security Council of the United Nations. Though resolutions are not a law for the Court within the ambit of article 38(1), they may well reflect the *opinio juris* of States, capable of defusing the potency of a rule adopted by the Court. Such a contrary resolution is a strong indication that the rule has not been well received by States. This can be seen in the light of the role being played by Security Council Resolutions 1368 (2001) and 1373 (2001) in relation to the exercise of the right to self-defence (article 51 of the Charter) in response to attacks carried out by non-state actors.

Following the September 1, 2001 terrorists attack on the United States, the Security Council adopted Resolutions 1368 (2001) and 1373 (2001), in which it recognised the inherent right of individual or collective self defence, without making any reference to armed attack by a State. These Resolutions have become one of the strongest bases for the argument urging the Court to overrule its current position which restrictively interprets article 51 to exclude attacks by non-state actors. These Resolutions were put forward by States and in the individual opinions of some Judges in the *Legal Consequences of the Construction of a Wall*

²⁶ *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objection*, CJ Rep, 1998, 271

²⁷ Dissenting, *Ibid*, p 388

*in the Occupied Palestinian Territory*²⁸ and *Armed Activities on the Territory of the Congo*.²⁹

They have been relied upon to urge the Court to reconsider its case-law on the point, notwithstanding that the Resolutions did not directly address the case-law of the Court.

Having made the above points, the writer shall now discuss two broad occasions in which the ICJ exercises its lawmaking faculty in the performance of its functions. The Court does this: (a) in the course of the interpretation and application of existing law; (b) when there is a gap in the law. The former is less obvious though it is an element in every decided case interpreting an instrument. The latter is much more obvious; it is a more controversial transgression to theoretical argument that judges should apply the law and not make it.

7.3 Lawmaking through the Interpretation and Application of Existing Law

It is often the case in practice that in addition to the task of interpreting and applying the law to concrete cases, courts often share lawmaking functions with lawmaking organs. The real difficulty is to actually identify to what extent it can be said to a judge: “you must only apply positive law as it is; there are no rooms for implications and presumptions that would attribute to positive law a meaning it does not originally admit”; or that there is no room for recognising a legal position not expressly recognised by positive law. Of course, it is hardly possible for a court to apply positive law without elaborating its meaning through principles of general application and thereby creating new rules. It is by doing this that the Court supplies important details to the treaties and gives the fullest expression to their obligations. In consequence, although the Court is declaring the treaty law, it is actually doing a little more than just declaring the law as it is; it is opening the law to new situations and facts. This, perhaps, is why Katharina Pistor posited that:

²⁸ *ICJ Rep 2004*, 136. Also see in the case, *Separate Opinion of Judge Pieter Kooljmans*, p. 230, para 35

²⁹ (*DRC v. Uganda*) *ICJ Rep 2006*, 168. Also see in the case, *Separate Opinion of Judge Bruno Simma* p. 337, para 11; *Separate Opinion of Judge Kooljmans*, p. 314 para 28

The line between lawmaking and interpretation ... is often difficult to draw. Interpretation, even if narrowly construed, involves an element of residual law making. It implies that the application of a law to a particular set of facts does not follow immediately from the working of the statute [or treaty]... in one sense, civil law judges may be said to be less constrained than common law judges. They are not subject to the rule of precedent ...yet the absence of a former precedent rule still may give judges more leeway in interpreting the law.³⁰

This point was also made by Judge Tanaka when he acknowledged that where, in reality, the borderline can be drawn between when a judge declares the law and when she legislates is a very delicate and difficult matter.³¹

When States appear before the ICJ, each of the States holds a different opinion of what should be the law applicable to the dispute. But none of the litigating States, not even the individual judges of the Court is able to state precisely what manner the applicable law would be applied until the facts and circumstances of a case have fully unfolded and are subjected to legal evaluation. These only unfold with the finding of facts, the arguments of the parties and the reasoning of the Court.

In the course of a case, several possible viewpoints may appear from the arguments presented to the Court by the parties. It may occur that: (a) the parties agree that a treaty law governs the dispute but yet hold conflicting views on the correct interpretation of that treaty; (b) The parties may hold conflicting views on the applicable law: this may raise two additional scenarios. First, one of the parties may hold that a treaty governs the situation while the other may hold that it is governed by a general rule of custom; second, a party may claim the existence of a rule of law which is denied by the other party – this is mostly the case with international customs. In these situations it is for the Court to decide, not only on the applicable law, but also how it is to be applied to the facts of the case. In either case, it is the

³⁰ Katharina Pistor and Chenggang Xu, “Incomplete Law”, 35 N.Y.U. J. Int’l Law & Pol. 931, 947 (2003)

³¹ Dissenting, *South-West Africa (Second Phase)*, note 13, p. 277

view of the Court that is recognised as the correct position of the law. This, in the ultimate, depends on the perspective that appeals to a majority of the Judges hearing the case.

This is particularly important because the ICJ has severally affirmed that it is not bound to accept the law held to be applicable by the parties or the interpretations contended for by them.³² This viewpoint has been taken in a number of cases. In *the Advisory Opinion on the Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*, while interpreting article 33 of the Convention of Paris between Poland and the Free City of Danzig, in relation to Polish citizens in Danzig, the Court noted that the provision has received different interpretations from the respective governments. Nonetheless, the Court held that in giving its interpretation of the clause of the treaty sought to be interpreted, it is in no way bound by the views of the interested governments.³³ In the *case of S.S Lotus*,³⁴ the Court refused to confine itself to a consideration of the arguments of the parties in ascertaining the principle of international law governing the institution of criminal proceedings against an alien for crimes committed on the high sea.³⁵ In the *case Free Zones of Upper Savoy and the District of Gex*³⁶ the Court reaffirmed that its functions being to declare the law, it cannot lightly be admitted that it can be called upon to choose between two or more constructions determined beforehand by the Parties, none of which may correspond to the opinion at which it may arrive.³⁷ For:

³² Judge Koroma, dissenting, *Legality of Nuclear Weapons*, note 4, p. 558 (“The Court has always taken the view that the burden of establishing the law is on the Court and not on the Parties”)

³³ Series A/B No. 44 PCIJ, 35

³⁴ Series A No. 10

³⁵ *Ibid*, p. 31

³⁶ Series A/B, No. 46

³⁷ *Ibid*, p. 138

Unless otherwise expressly provided, it must be presumed that the Court enjoys the freedom which normally appertains to it, and that it is able, if such is its opinion, not only to accept one or the other of the two propositions, but also to reject them both.³⁸

In the *Delimitation of the Maritime Boundary in the Gulf of Maine Area*,³⁹ while rejecting the view of both parties, a Chamber of the Court expressly declared that the reasoning of each of them was based on a false premise because each was searching general international law for a set of rules which was not there. The Court has even gone as far as holding that the concurrence of the views of the parties on the content of an applicable customary international law does not dispense the Court from having itself to ascertain what rules of customary international law are applicable.⁴⁰

The fact that the existence of a custom or content of a particular treaty may have diverse views is already a direct pointer to the fact that the viewpoint that has final acceptance has an opportunity of choosing between varied options inclusive of the power to make policy decisions. The organ that has that viewpoint in questions of international law submitted to it is the ICJ. Accordingly, the Court may uphold the argument of a party and reject that of the other party or it may reject the arguments of both parties and take an independent view of the applicable law. In respect of a custom, the Court may uphold the argument that the custom does exist as law or deny its existence. Concerning a treaty, the Court may apply the treaty as it finds it or take into account the progressive elements of time. The underlining current in these scenarios is the element of choice that is always at the disposal of the Court, even in cases where it is called upon to interpret and apply a definite treaty.

The creative consequence in this element of choice was noted by Mohammed Shahabuddeen when he argued that “in exercising this element of choice he [the judge] is inevitably

³⁸ *Ibid*

³⁹ (*Canada v. United States*), ICJ Reps 1984, 246, 288 para 110

⁴⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States) Merit*, ICJ Rep 1986, 14, 97-98, para 184

selecting a rule to govern the case; if no suitable rule exists, he makes one".⁴¹ The point is that there are always the chances of a treaty rule taking on a new garb from the time it is applied by the Court. This emphasises the fact that, the existence of a treaty or a rule of custom, notwithstanding, there may be the need to adapt the law to the progressive elements of facts as they emerge with the passage of time. The South West Africa mandate controversies provide a particularly useful example. In this case, the Court interpreted the mandate system in the light of the events contemporaneous with the time the Court was seised, taking account of the wellbeing and development of peoples as a strong factor. By so doing, the Court arguably modified the mandate system. For the avoidance of doubt, the Court declared in one of its opinions on the question of the South-West African mandate that:

All these considerations are germane to the Court's evaluation of the present case. Mindful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in Article 22 of the Covenant-"the strenuous conditions of the modern world" and "the well-being and development" of the peoples concerned-were not static, but were by definition evolutionary, as also, therefore, was the concept of the "sacred trust". The parties to the Covenant must consequently be deemed to have accepted them as such. That is why, viewing the institutions of 1919, the Court must take into consideration the changes which have occurred in the supervening half-century, and its interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation. In the domain to which the present proceedings relate, the last fifty years, as indicated above, have brought important developments. These developments leave little doubt that the ultimate objective of the sacred trust was the self-determination and independence of the peoples concerned. In this domain; as elsewhere, the *corpus iuris gentium* has been considerably enriched, and this, the Court, if it is faithfully to discharge its functions, may not ignore.⁴²

In essence, the Court was admitting that it is conducive to the fulfilment of its functions to apply the law in the light of developments in other areas of the law. This is invariably an

⁴¹ Mohammed Shahabuddeen, *Precedent in the World Court*, 89 (Grotius Publications Cambridge University Press, 1996)

⁴² *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, note 9, p 31, para 53

admission of its power to adapt the law to the dictates of time. A clear indication that this is indeed an aspect of lawmaking is the fact that there is no guarantee that States would have consented to the legal consequences attendant upon such interpretation, was the mandate system presented for amendment.

The point made in this section is that the Court exercises a residuary lawmaking power when interpreting a treaty and when determining the existence of a rule of custom. It is pointed out that judicial legislation does not equate the Court with a formal legislature: the Court's role is residuary and the rules it makes are those deducible from the consciousness of the society, though yet to be legal rules. On the whole, the writer argued that judicial legislation is a product of the element of choice at the Court's disposal. This is a precursor to the next section which discusses law-making in relation to interpretation and application of treaties.

7.3.1 In the Interpretation of Treaties

There is the truism that it is the province of States to make treaties and that of the Court to interpret. True; but this theoretical division of functions, though ideal, has never been attained in the making and application of the rules of international law, nor under any given legal system for that matter. As bluntly remarked by Judge Alvarez, "the common view that international law must be created solely by States is ... not valid to-day-nor indeed has it ever been".⁴³ And as "far as the Court is concerned, the tasks of determining, establishing and applying the law go hand in hand".⁴⁴

The writer shall now discuss how the Court uses its element of choice to adapt law to new situations in interpreting and applying treaties.

⁴³ Dissenting, in the Competence of Assembly, note 11, p. 14

⁴⁴ *Ibid*

7.3.1. (a) Judges Legislate When Choosing Interpretations

The fact that parties are having a dispute over the application of a treaty invariably implicates judicial choice. This is obvious from the definition of a dispute in *Mavrommatis Palestine Concessions*.⁴⁵ Here, the PCIJ defined a dispute as a “disagreement on a point of law or fact, a conflict of legal views or interests between two persons”.⁴⁶ When the disputing States come to the Court, therefore, they are asking the Court to choose between the disputed interpretations to which the treaty lends itself.

This situation abounds in the case-law of the Court. In the *Right of Passage* case,⁴⁷ the parties disputed the interpretation of article 36(4) of the Statute of the Court. The article provides that declarations by which States accept the compulsory jurisdiction of the Court shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court. A view was that the transmission requirement is mandatory. The contrary view was that it is merely permissive. If the former view was followed by the Court, it would knock off every case brought by a declarant whose declaration had not been transmitted to other parties to the optional clause system, as the new declaration would remain inchoate until the transmission requirement was fulfilled. If the latter view was followed, the declaration of a new declarant *vis a vis* the existing parties to the optional clause system would be complete and active, once deposited, irrespective of non transmission. The new declarant would be able to sue any of the existing members upon the deposit of her declaration. It was for the Court to either choose one of the interpretations contended for, or take an entirely independent view.

⁴⁵ Series A - No. 2, Judgment of August 30, 1924. In *Nuclear Tests (New Zealand v. France)* ICJ Rep 1974, 457, 436, para 58, it was stated that, “the Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial functions”.

⁴⁶ *Ibid.*, p. 11

⁴⁷ Note 24

This can also be buttressed by the approach of the Court towards article 51 of the United Nations Charter. The article made the occurrence of “armed attack” crucial to the existence of the right to self-defence, but failed to define the term “armed attack”. It has been for the Court to supply a working definition of the term. The definition supplied by the Court has so far controlled the scope of application of the provision. This term has been interpreted in a number of cases – *Nicaragua case*,⁴⁸ *Construction of a Wall*,⁴⁹ and *DRC v Uganda*.⁵⁰ In all of these cases, the Court was faced with two conflicting views on the definition of the term. A view required the Court to give a wide coverage to the term to include attacks by non-state actors while the other view argued for a narrow interpretation that would exclude attacks by non-state actors. The gist is that if the Court adopted the former, the law in article 51 would be that States are entitled to invoke self-defence against attacks by entities other than States. But if the Court adopted the latter view, the law in article 51 would be that there is no right to self-defence for attacks carried out by entities other than States. In all the cases mentioned earlier, the Court has consistently maintained the latter view. This view has remained the prevailing law despite the disagreement of some States,⁵¹ Scholars⁵² and even some of the Judges of the Court.⁵³

The bottom-line of the exercise of its element of choice is that in choosing between the various options, the Court establishes rules/principles with legal consequences, not just for the parties but also for future cases. In *Right of Passage*, it was open to the Court to hold that

⁴⁸ Note 40

⁴⁹ Note 28

⁵⁰ Note 29

⁵¹ Since the September 2001 terrorists attacks on the United States, the United States and its allies have openly asserted the right to invoke self defence against attacks by non state actors. The deployment of force in Iraq and Afghanistan are common testimonies to this.

⁵² Andrea Bianchi, “The International Regulation of the Use of Force: The Politics of Interpretative Method”, 22(4) *Leiden Journal of International Law*, 651, 654-655 (2009)

⁵³ See Separate Opinion of Rosalyn Higgins in the *Construction of Wall Opinion*, note 28, p. 215, para 33, Separate Opinion of Judge Pieter H. Kooijmans in the *Construction of Wall Opinion*, *id.*, p. 230, para 35; Separate Opinion of Judge Kooijmans, *DRC v. Uganda*, note 29, p. 313 para 25 and 315 para 35; Separate Opinion of Judge Bruno Simma in *DRC v. Uganda*, *id.*, p. 337, para 11

transmission was compulsory. If the Court did this, it would have had a different effect not only on the parties to that case, but also on the parties in the case between *Cameroon and Nigeria*, which was argued and determined upon the *Right of Passage* precedent;⁵⁴ that choice would have governed the application of article 36(4) of the Statute of the Court.

7.3.1. (b) The Court Supplies the Unwritten Elements in Treaties

Facts are not stereotype. Facts do not present themselves exactly in the light in which States envisaged them when making or acceding to treaties. States make treaties but do not direct the Court on how it must apply the treaty to facts. It is the Court that determines the legal consequences resulting from the application of the law to facts. The written law can never be exhaustive of all the events that may come within its shade; there always are unwritten elements which the Court supplies in the course of interpretation and application of the law. By these elements, the Court does not only bridge the gap between facts and the law, it also determines the facts that are relevant to the provision. It may occur that in the course of time, factual exigencies expose gaps which were not obvious at the time a treaty was made. When this situation presents itself, the Court supplies the unwritten elements of the treaties and with those elements, ascribes legal consequences to the new set of facts.⁵⁵ This is a recurrent trend in the field of interpretation of a written law both in domestic and international law. A few examples would suffice here.

⁵⁴ See page 251 above

⁵⁵ Separate Opinion of Judge Ranjeva in *the Nuclear Weapons case*, note 4, p 296 (stating that “the facts precede the law in the examination of the relationship between facts and the law: the analysis of the facts determines the application of the rule of law”.)

In the *Legal Consequences of the Presence of South Africa in Namibia*⁵⁶ the unwritten rule was the power to terminate a Mandate in consequence of a breach. The Court held that though the Covenant of the League of Nations did not confer on the Council of the League the power to terminate a mandate for misconduct of the mandatory, the Covenant cannot be interpreted to exclude the application of the general principle of law according to which a power of termination on account of breach, even if unexpressed, must be presumed to exist as inherent in any mandate, as indeed in any agreement. This ruling was in response to the argument of some States that the power to revoke the mandate on occasion of a breach was not possible in the absence of an express stipulation in the Covenant. The unwritten provision in the *Effect of Awards of Compensation made by the U. N. Administrative Tribunal*⁵⁷ was the power of the United Nations General Assembly to establish a judicial tribunal to adjudicate upon disputes arising out of the contracts of service between the United Nations and its employee. The Court opined that this must be read into the Charter, though the Charter did not expressly provide for the establishment of judicial bodies or organs.⁵⁸

In supplying the unwritten term of a treaty, the Court is not bound to remain within the bounds of international law. It can, as it is well allowed to do by article 38(1)(c) of its Statute, resort to private law sources for general principles. This was how Judge Weeramantry expressed the point in *Cameroon v. Nigeria*:⁵⁹

It is true we are considering a question of international law, but this analysis shows us also that we are very much in the sphere of the law of consensual obligations, from which we draw our general principles and foundation requirements. We must not be diverted from the basic principles of this body of law, as universally recognized, by the circumstance that we are operating in the territory of international law. Where any situation in international law depends on consensus, the generally accepted principles relating to consensual obligations would apply to that situation, unless expressly varied

⁵⁶Note 10, p. 47-48 para 96-98

⁵⁷ICJ Rep 1954, 47, 56-57

⁵⁸*Ibid*

⁵⁹Dissenting, note 26, p. 368-369

or abrogated. How is a consensual obligation formed? The completed legal product results from the classical process of the meeting of minds which follows from a confluence of offer and acceptance. This is accepted by most legal systems, with the rarest of exceptions. This principle is accepted alike by the Anglo-American law and the Romanistic legal systems. There are indeed substantial differences among different legal systems regarding such matters as the status and revocability of the offer, but the basic principle that the minds of offeror and offeree must meet remains unaffected by these considerations, and belongs to the common core of legal systems.

However the Court goes about adapting the law to new situations, is a manifestation of the exercise of judicial choice. It must not be forgotten that the Court could decide to interpret the law as it finds it and ignore all indications pointing to the possibility of adapting the law to new situations: this is yet an element of choice.

The importance of the point being made lies also in the fact that the choices of the Court have continuous application. In *Northern Cameroons* case,⁶⁰ the Court made it clear that if its judgment expounds a rule of customary law or interprets a treaty, the judgment has a continuing applicability during the life time of the treaty.⁶¹ With this quality, the rules/principles laid down by the Court are pieces of judicial legislation providing legal bases for the resolution of similar conflicts in future.

This should however not be understood to mean that an interpretation cannot outlive the particular treaty in which it was made. The case-law of the Court has shown that a rule/principle adopted in the course of interpreting a particular treaty has continuous applicability to all other similar treaties between completely different States. This could be buttressed by the continuous application to other cases of the principle the Court adopted while interpreting the Treaty of Friendship and Navigation between the United States and

⁶⁰ (*Cameroon v. United Kingdom*) *Preliminary Objections*, ICJ Rep 1963

⁶¹ *Ibid*, p. 37

Nicaragua in the *Nicaragua case*.⁶² This principle was applied to different but similar treaties in the *Oil Platforms*,⁶³ and in *Certain Questions of Mutual Assistance in Criminal Matters*.⁶⁴

In the *Nicaragua case*, Nicaragua had urged the Court to hold, in respect of the 1956 Treaty of Friendship between her and the United States, that a State which enters into a treaty of friendship binds itself, for so long as the Treaty is in force, to abstain from any act toward the other party which could be classified as an unfriendly act, even if such act is not in itself the breach of an international obligation. The Court held that the unfriendly acts that would breach the treaty were those that affect the specific fields covered by the treaty – its object and purpose – and not just any form of unfriendly acts in a vague sense.

That decision has been constructed to mean that a treaty of friendship does not warrant the conclusion that all unfriendly acts are in breach of its provisions. Accordingly, in the *Oil Platforms case*,⁶⁵ the Court declined Iran's invitation to interpret the Treaty of Amity between her and the United States to cover all forms of unfriendly acts. In *Djibouti v. France*,⁶⁶ the Court also had to construe the Treaty of Friendship between France and Djibouti. France expressly argued that it was basing itself on the "principle of interpretation established by the Court with regards to other friendship treaties" in the *Nicaragua and Oil Platform cases*. The Court maintained that this construction was equally applicable to the Treaty of Friendship and Co-operation between *Djibouti and France*.

The pattern followed by the Court in the foregoing cases is germane for two reasons: (a) it emphasises how the Court sets the general legal rules/principles in certain areas of States relations to the extent that when States enter into agreements in those areas, such agreements

⁶² Note 40,, p 137, para 273

⁶³ (*Iran v. United States*) ICJ Reps 1996, 803

⁶⁴ (*Djibouti v. France*) ICJ Rep 2008, 177

⁶⁵ Note 63

⁶⁶ Note 64

would operate in line with the general rule/principles set by the Court, unless the parties expressly provide otherwise. For instance, when entering into treaties of friendship and navigation, States would bear in mind that the treaties have to be specific in the areas to which the friendship extends. This would be necessitated by the general rule set by the Court that such treaties do not cover friendship at large. (b) The cases also emphasise the argument that a rule/principle adopted in the course of construing a treaty does not only have continuous applicability but that its application is wider than, and is separable from the treaty in which it was adopted. The Court expressly showed that it was conscious of this when applying the rule in *Djibouti v. France*. Here, the Court acknowledged that it had dealt with similar situation in the past and expressly stated that the case was being decided, “[I]n the light of the case law of the court mentioned above”.⁶⁷ Of course, it is self-evident that the contrary interpretation would have held sway, if chosen by the Court.

The point being made is that the Court exercises its residual lawmaking power even when interpreting treaties and that the Court could redefine the scope of a treaty through interpretation. The consequence is that a different regime of law from the one being interpreted may come to life from the choices the Court makes. This point has also been well made by Judge Shahabuddeen in his *Separate Opinion in Maritime Delimitation in the Area between Greenland and Jan Mayan*.⁶⁸ In determining whether article 6 paragraph 1 of the Geneva Convention 1958 was applicable to the delimitation of a single boundary for the continental shelf and the fishery zone, the Judge found it “necessary to consult a body of case-law”⁶⁹ with a view to establishing the interpretation previously placed on it by the Court. After examining a number of cases on the point, the Judge remarked:

⁶⁷ *Djibouti v. France*, note 64, p. 218, para. 111

⁶⁸ (*Denmark v Norway*), *ICJ Rep 1993*, 38

⁶⁹ *Ibid*, p. 132

The literature is heavy with a view that the jurisprudence has placed a certain interpretation on Article 6 of the 1958 Convention ... that interpretation varies from the terms of the provision and indeed substantially alters its intent; but that the variation so effected is now an established part of the living law; and that it is therefore a futile effort of revisionism, if not simply impermissible, to trouble over the original meaning of the provision. Respecting that view, a lawyer who goes to work on the problem would still like to know the precise legal route through which so remarkable a change has come about. Something more than impressions is required; it is not enough to be told, however confidently, that, whatever the provision meant in 1958, it now has to be interpreted and applied in accordance with the jurisprudence as it has since developed. Yes; but how? And to what extent? The change could not have occurred through osmosis. If the provision is now to be understood differently from the way it would have been understood when made, is this the result of subsequent developments in the law operating to *modify* the provision in a legislative sense? If, as it seems, there has not been any such modification, is the different reading which the provision must now receive the result of *judicial interpretation* which the Court considers that it should follow, even though it is not bound by any doctrine of binding precedent? If not, how has the transformation of the original meaning of so important a treaty provision been managed?⁷⁰

Judge Alvarez expressed the same view in the *Competence of Assembly Regarding Admission to the United Nations*. According to him:

First, we observe that national courts, in their interpretation of private law, seek to adapt it to the exigencies of contemporary life, with the result that they have modified the law, sometimes swiftly and profoundly, even in countries where law is codified to such an extent that it is necessary to-day to take into consideration not only legal texts, but also case-law. It is the same, *a fortiori*, in the interpretation of international matter, because international life is much more dynamic than national life⁷¹

To a very large extent, the opinions of the Judges Shahabuddeen and Alvarez strengthen the view that the Court does not approach its task of interpretation and application of treaties with a belief that treaties are iron cast. In the course of interpretation and application, the Court develops and, sometimes, modifies express provisions of treaties.

As earlier stated in chapter one and maintained through this work, the Court cannot amend a treaty in the manner of the legislature amending laws; the Court is not an international

⁷⁰ *Ibid.*, p.,133-134

⁷¹ Dissenting, Competence of Assembly, note 11, p. 16

legislature. Therefore, it cannot expressly state that it is making a new rule from a treaty. The Court thus legislates under different guises while interpreting and applying treaty provisions without actually appearing to be doing so. We shall now discuss some of these guises.

7.4 Guises for Judicial Legislation in the Interpretation and Application of Treaties

7.4.1.(a) The Notion of Implied Terms

Courts, both municipal and international, use this device to give effect to the exercise of a power expressly granted by a legislative instrument. In *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Judge Shahabuddeen explained the notion of implied terms in the light of the maxim: “when the law gives a man anything, it gives him that also without which the thing itself cannot exist”.⁷² The practice of implying powers not expressly granted by legislative instruments is a useful interpretative device and an acceptable practice in the ICJ. This is justified by the fact that foresight is always too short and words too limited to envisage and expressly provide for all possible eventualities and contingencies which might require the application of a written instrument. To bridge the gap between a legal instrument and the succession of events that may in future require the application of the instrument, the Court has in the past resorted to the use of implied terms.

For a term to be implied there must be a parent provision enabling the implied term. When there is no parenting provision for a term being implied, the Court is acting neck-deep in the realm of lawmaking; it thus becomes a guise for judicial lawmaking. This point was made by Judge Green Hackworth in the *Reparation case*. Here, the Judge reasoned that “powers

⁷² Separate Opinion, ICJ Rep 1989 177, 220

cannot freely be implied. Implied powers flow from a grant of expressed powers, and are limited to those that are "necessary" to the exercise of powers expressly granted".⁷³

The interpretation of treaties by necessary implication is unavoidable considering the inconveniences that may occur if States would have to return to the negotiating table to provide for every term, which though was not contemplated when the treaty was made had, with the passage of time, become crucial to the exercise of the express grant in the treaty. This does not detract from the fact that whenever the implied term does not flow from an express grant, the Court could clearly be said to use implied powers as a convenient disguise for lawmaking. Again, this was the basis upon which Judge Hackworth dissented in the *Reparation case*. The Judge argued that it cannot be safely said that the power implied by the Court flowed from an express grant in the Charter.⁷⁴ The *Reparation case* testifies to how far-reaching the Court could affect the tenor of a treaty through the use of implied terms. Indeed, it is difficult to see the provision of the Charter or the Statute of the Court from which the powers which the Court deemed to be exercisable by the United Nations can rightly be implied. This is particularly so in view of article 34 of the Statute of the Court, which limits the Court's competence to States. It explains why it is generally agreed that the Court did clearly exercise its residual lawmaking power in that case.

Obviously not concerned about being accused of usurping the power of States to modify such an important treaty as the United Nations Charter, five years later, the Court based itself on the *Reparation case* as its authority for implying that the General Assembly has power to establish tribunals, in the *Effect of Awards of Compensation*.⁷⁵ Here the Court cited the *Reparation case* for the legal proposition that:

⁷³ Note 14, p 197-198

⁷⁴ *Ibid*

⁷⁵ Note 57, p. 56-57

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties.⁷⁶

Accordingly, but absent a parenting provision, the Court implied that the General Assembly has power to establish tribunals, not from a provision of the Charter but from the absence of any provision authorising any of the principal organs of the United Nations to adjudicate upon such disputes between it and its employees, as well as the fact that the United Nations enjoys jurisdictional immunities in national courts. In clear terms, the Court said:

It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them. In these circumstances, the Court finds that the power to establish a tribunal, to do justice as between the Organization and the staff members, was essential to ensure the efficient working of the Secretariat.... Capacity to do this arises by necessary intendment out of the Charter.⁷⁷

These are two instances where the Court legislated though disguising the new rules in implied terms.⁷⁸ The Court did not identify in the Charter, the express grants from which it implied the powers it vested on the United Nations in both cases. Judge Hackworth emphasised this point in the *Reparation case*, when he argued that there was no specific provision in the Charter from which the power of the United Nations to espouse diplomatic claims on behalf of its agents could be implied and that there was no implied power to be drawn upon for that

⁷⁶ *Ibid*, p. 56

⁷⁷ *Ibid*, p. 56

⁷⁸ There is also the *Dispute Regarding Navigational and other Related Rights (Costa Rica v. Nicaragua)*, ICJ Rep, 2009, 213, 248, Para 84. Here the Court was construing article VI of the 1858 Treaty of Limits between the parties. The article granted limited navigational rights to Costa Rica in the San Juan River for the purpose of commerce. Notwithstanding that the right was limited to navigations relating to commerce, the Court held that though the right of navigation for basic necessities of life by Costa Ricans on the bank of the river and for the purpose of certain Costa Rican official vessels were not expressly granted, they could be inferred from the provision of the treaty as a whole.

purpose.⁷⁹ How then could the Court possibly be certain that the parties would have accepted the treaty had the term being implied by the Court been included, *ab initio*?

7.4.1 (b) Implied Acceptance of the Jurisdiction of the Court

Article 36 of the Statute of the Court adopts the general rule of international law that the Court's jurisdiction depends on the will of the parties.⁸⁰ As a corollary, the Court cannot exercise jurisdiction over a State without its consent. The article makes provisions for three instances of consent that could ground jurisdiction.⁸¹ They are:

1. Cases which the parties refer to it;
2. Matters specially provided for in treaties in force;
3. Declarations by States that they 'recognize as compulsory ... without special agreement ... the jurisdiction of the Court in all legal disputes

There is nowhere in the Statute of the Court or the Charter of the United Nations where implied consent or *forum prorogatum* is provided for.⁸² Nonetheless, the Court has established *forum prorogatum* as, arguably, the fourth basis of jurisdiction, and had on that basis assumed jurisdiction over States in a number of cases. The Court implies this basis of jurisdiction from article 36(1) of its Statute. The ICJ confirmed, while discussing the different modes of consent under article 36, in *Djibouti v. France*, that:

The Statute of the Court does explicitly mention the different ways by which States may express their consent to the Court's jurisdiction.... The Court has also interpreted Article 36, paragraph 1, of the Statute as enabling consent to be deduced from certain acts, thus accepting the possibility of *forum prorogatum*.⁸³

⁷⁹ Dissenting, note 14, p. 197-198

⁸⁰ *Rights of Minorities in Upper Silesia*, P.C.I.J., Series A, No. 15, p. 24.

⁸¹ Article 36(1) and (2) of its Statute

⁸² The closest to *forum prorogatum* is the deferred consent of a State under article 38(5) of the Rules of the ICJ of July, 1 1978. Under this article, an applicant can file a case ahead of the consent of the respondent. If the respondent consents, a *forum prorogatum* is created as the consent has a retrospective effect to validate the case from the date it was filed. The Court followed this pattern in *Corfu Channel case (United Kingdom v. Albania)*, Preliminary ICJ Rep 1948, 56, 27-28.

⁸³ Note 64, p. 203, para 60-61. It remains to be seen, how *forum prorogatum* meets the requirement of voluntary and unqualified consent under article 36(1).

Under the rule as developed by the Court, a respondent State can be held to have accepted the jurisdiction of the Court respecting a case, if the State engages in conducts sufficient to be regarded as an acceptance of the jurisdiction of the Court, notwithstanding that the State did not make any express declaration of consent to that effect. As explained by Judge *ad hoc*, Lauterpacht in the *first Genocide case*:

if State A commences proceedings against State B on a non-existent or defective jurisdictional basis, State B can remedy the situation by conduct amounting to an acceptance of the jurisdiction of the Court.⁸⁴

The rule was first adopted by the PCIJ in the *Rights of Minorities in Upper Silesia (Minority Schools)*,⁸⁵ In this case, though challenging the jurisdiction of the Court, Poland yet submitted arguments on the merit and filed a counter-claim. The Court noted that the Rules of Court, dealing with preliminary objections, did not cover a situation where an objection is not submitted as a preliminary question. Judging from the submission of a counterclaim aimed at a decision on the merit, the Court held that Poland's attitude reflected an unequivocal indication of her desire to obtain a decision on the merit of the suit.⁸⁶ The Court established that:

there seems to be no doubt that the consent of a State to the submission of a dispute to the Court may not only result from an express declaration, but may also be inferred from acts conclusively establishing it.⁸⁷

Forum prorogatum is based on some conduct or statement which involves an element of consent regarding the jurisdiction of the Court.⁸⁸ It follows, therefore, and as elaborately

⁸⁴ *Separate Opinion, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia (Serbia and Montenegro), Provisional Measures*, Order of 13 September 1993, I.C.J. Reps 1993, 416, para 24.

⁸⁵ P.C.I.J., Series A, No. 15, p. 1. Writers are agreeing that *forum prorogatum* was transferred into international law by the PCIJ – Vincent Pouliot, “Forum Prorogatum before the International Court of Justice. The Djibouti v. France Case”, 3(3) Hague Justice Journal 28, 33 (2008)

⁸⁶ *Ibid*, p. 24

⁸⁷ *Ibid*

⁸⁸ *Anglo Iranian Oil Co (United Kingdom v. Iran) Jurisdiction*, ICJ Reps 1952, 92, 113- 114.

explained by the Court in *Djibouti v. France*,⁸⁹ that a respondent State must have acted in a way that consent to the jurisdiction of the Court in a certain and unequivocal manner can be implied. Such a conduct towards the proceedings must be capable of being regarded as, “an unequivocal indication” of the desire of that State to accept the Court’s jurisdiction in a “voluntary and indisputable” manner. In the *Corfu Channel case*,⁹⁰ *forum prorogatum* was based on a letter written to the Court by Albania. In the letter, Albania had stated that it was irregular for the United Kingdom to unilaterally refer the dispute to the Court in the absence of an acceptance of the compulsory jurisdiction of the Court by Albania under article 36 of the Court's Statute or of any other instrument of international law. Nonetheless, Albania stated that it was “prepared, notwithstanding the irregularity, to appear before the Court”.⁹¹

On the contrary, in *DRC v. Rwanda*,⁹² the Court refused to apply *forum prorogatum* to hold that a party which had fully participated in different procedures of the Court, for the purpose of challenging jurisdiction, had impliedly accepted the jurisdiction of the Court.⁹³ In *the first Genocide case*,⁹⁴ the Court refused to apply *forum prorogatum* to hold that a party, which had requested for provisional order, impliedly accepted the jurisdiction of the Court.⁹⁵

From *Rights of Minorities in Upper Silesia*, where *forum prorogatum* was first applied by the PCIJ through the recently decided *Djibouti v. France*, the Court has crystallised it into a well developed branch of jurisdiction, creating an alternative strand of jurisdiction to those expressly provided in article 36 of its Statute. In *DRC v. Rwanda*, the Court emphasised the established state of the rule when it affirmed that the rule was fully settled both in its case-

⁸⁹ Note 64

⁹⁰ Note 82, 15

⁹¹ *Ibid*, p.18; also see *Rights of Minorities in Upper Silesia*, note 85.

⁹² *Armed Activities on the Territory of the Congo, Jurisdiction and Admissibility*, ICJ Reps 2006, 18

⁹³ *Ibid*, p. 19

⁹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia, Preliminary Objections*, ICJ Reps 1996, 595

⁹⁵ *Ibid*, p. 620-621

law and that of the PCIJ.⁹⁶ The rule is well supported by the practice of States which have also accepted the juridical status of the rule in their conducts and arguments before the Court.

7.4.2 Presumptions

Presumption is another means by which the Court disguises judicial legislation. There have been a number of cases where the Court altered the tenor of a treaty while claiming to be presuming the intention of the parties. Unlike the use of implied terms, presumption is not contingent upon the existence of a parenting provision. The Court could well take cognisance of matters extraneous to a treaty as a ground for the presumption to be made. In *Costa Rica v. Nicaragua*,⁹⁷ the Court was requested to settle the dispute concerning the extent of Costa Rica's right of navigation on San Juan River. To decide the case the Court had to construe article VI of the 1858 Treaty of Limits (drafted in Spanish). The Treaty recognised the sovereignty of Nicaragua over the River and granted Costa Rica limited rights of navigation.

The areas in which Costa Rica was to have navigational rights was defined by the Spanish expression "con objetos de comercio". It was the interpretation of this expression the Court was particularly engaged, as both parties were disagreeing on the English translation of the expression. For Nicaragua, the English translation was as, "with articles of trade". This would mean that the freedom of navigation guaranteed to Costa Rica by Article VI related only to the transport of goods intended to be sold in a commercial exchange. For Costa Rica, the expression means "for the purposes of commerce", in English. Consequently, Costa Rica, argued that the freedom of navigation given to it by the Treaty must be attributed the broadest possible scope encompassing not only the transport of goods but also the transport of passengers, including tourists.⁹⁸

⁹⁶ Note 92, p 18-19

⁹⁷ Note 78

⁹⁸ *Ibid*, p 24, para 43-44

Deciding the dispute, the Court declared that it would subscribe to neither the particularly broad interpretation advocated by Costa Rica nor the excessively narrow one put forward by Nicaragua. Rather, the Court declared that the term “comercio” must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.⁹⁹ Following this approach, the Court extended the expression to cover the transport of persons (including tourists) and of goods, so long as the activity was carried out for a price.

As to whether the same expression granted navigational rights to the inhabitants of the villages on the Costa Rican bank of the River in order to meet the basic requirements of everyday life, which was carried out without a fee, Nicaragua urged the Court to answer the question in the negative. Nicaragua contended that the expression, “comercio”, delimiting the navigational rights of Costa Rica could not be so construed. To Costa Rica the answer was in the affirmative, following the broad definition of “commerce”, it had earlier advocated.

Rejecting the view of both parties, the Court affirmed that the carriage of passengers free of charge, or the movement of persons on their own vessels, for purposes other than the conduct of commercial transactions, could not fall within the scope of “navigation for the purposes of commerce” within the meaning of Article VI of the 1858 Treaty. Yet the Court opined that the existence of navigational rights for the purpose of meeting basic necessities could be presumed, though such a right was not derivable from the express language of the treaty.¹⁰⁰

The Court justified its position by stating that it could not have been the intention of the authors of the 1858 Treaty to deprive the inhabitants of the Costa Rican bank of the river, where that bank constitutes the boundary between the two States, of the right to use the river to the extent necessary to meet their essential requirements, even for activities of a non-commercial nature, given the geography of the area.

⁹⁹ *Ibid.*, pp. 28, 30, 31; paras 60, 70, 71

¹⁰⁰ *Ibid.*, p. 33, Para 79

While disagreeing with this aspect of the judgment, Judge Leonid Skotnikov highlighted the ingredients of lawmaking in the presumption made by the Court. The Judge was of the firm view that the presumption was not based on any evidence before the Court, contending that the Court ignored, if not overruled the customary practice of the Parties.¹⁰¹ He argued that the Court was wrong to have presumed that the use of official vessels for the purpose of providing services to riparian communities was within the rights granted Costa Rica by the treaty, as such a practice could not have been contemplated by the parties at the time the treaty was concluded.¹⁰²

It is clear from the totality of the case and the argument of the parties that the Court indirectly rewrote the terms of the treaty. This was not a case of a mere interpretation of treaty terms, it basically concerned rights granted by the treaty on the basis of agreement between the parties. By rejecting the arguments of the parties and presuming that the treaty granted rights to riparian communities without express grant in the treaty and without a provision enabling any implication to be made, the Court expressly made a law for the parties.

7.4.3 Generic Terms

Another guise for lawmaking in the application of treaties is the construction of generic terms. Where generic terms are used in a treaty, the Court considers itself at liberty to progressively interpret the treaty as the generic terms evolve. The Court has premised this rule on three factors: (a) where the parties have used generic terms in a treaty, the parties necessarily having been aware that the meaning of the terms was likely to evolve over time; (b) where the treaty has been entered into for a very long period; and (c) where the treaty is “of continuing duration”. The Court follows the practice that where these factors are present,

¹⁰¹ Separate Opinion, *Costa Rica v Nicaragua*, *ibid*, p. 284-285, paras 8-10

¹⁰² *Ibid*, p 285, paras 11-12

the parties must be presumed, as a general rule, to have intended those terms to have an evolving meaning.¹⁰³

Though this appears in form of presumption, it is not actually presumption that leads to the expansion of the scope of the treaty; the expansion lies in the limit to which the Court is willing to stretch the treaty through the evolution of the generic terms used in the treaty. The presumption that the parties intend generic terms to have an evolving meaning is only a means to an end. The most comprehensive statement of the use of generic terms was made in the *Aegean Sea Continental Shelf case*.¹⁰⁴ In this Case, while interpreting a clause in the General Act of 1928, the Court declared:

Once it is established that the expression ‘the territorial status of Greece’ was used in Greece’s instrument of accession [to the General Act of 1928] as a generic term denoting any matters comprised within the concept of territorial status under general international law, the presumption necessarily arises that its meaning was intended to follow the evolution of the law and to correspond with the meaning attached to the expression by the law in force at any given time. This presumption, in the view of the Court, is even more compelling when it is recalled that the 1928 Act was a convention for the pacific settlement of disputes designed to be of the most general kind and of continuing duration, for it hardly seems conceivable that in such a convention terms like ‘domestic jurisdiction’ and ‘territorial status’ were intended to have a fixed content regardless of the subsequent evolution of international law.

The far-reaching effect of the use of presumption could be seen in *Costa Rica v Nicaragua*.¹⁰⁵ Here, the term, “for the purpose of commerce” was extended to cover the transfer of persons and tourists for commercial purposes, though the transfer of persons (such as tourists) was not a commercial venture and thus not contemplated by the parties when the Treaty was made in 1858. The Court declared that even assuming that the notion of “commerce” does not have the same meaning today, as it did in the mid-nineteenth century, it is the present meaning

¹⁰³ *Costa Rica v Nicaragua*, *ibid*, p. 243, para 66

¹⁰⁴ (*Greece v. Turkey*): ICJ Rep 1978, 3, 32

¹⁰⁵ Note 78

which must be accepted for purposes of applying the Treaty.¹⁰⁶ A meaning, which as could be gathered from her argument before the Court, Nicaragua would not have accepted if the treaty was made contemporaneously with the decision of the Court.

The approach of the Court in the foregoing cases corresponds to the view of Rosalyn Higgins that judges have a law-creating function because adjudication is not a mere automatic application of existing rules to particular situations.¹⁰⁷ She further argued that the interpretative function of judges may do much to fill alleged gaps.¹⁰⁸ In agreement with this view, Lauterpacht argued that as inadequacies in the international legal system stem from imperfections in the lawmaking process, there is particularly wide scope for judicial interpretations.¹⁰⁹ Lauterpacht further agreed with the view that every application of a legal rule constitutes a degree of the creation of a rule for the individual case, and that although the nature of the law creating activity of courts is different from that of the legislature, it is nevertheless constant in operation.¹¹⁰

No doubt, there may be disputes as to the extent each writer is willing to admit that the Court makes law in the course of interpretation and application of treaties. But in reality it can hardly be disputable that the Court does actually make law in the process. This is even more telling by the fact that the law between the parties regarding the treaties construed by the Court in the foregoing cases can no longer be ascertained on the bare language of the treaty but from the decisions of the Court relating to the treaties.

Before proceeding to the next section, it is worth remembering that the writer is discussing two broad occasions for judicial legislation. These are: (a) cases where the Court is engaged with the interpretation and application of existing law; and (b) cases where no rule of treaty

¹⁰⁶ *Ibid*, p., 30, Para 66

¹⁰⁷ Rosalyn Higgins, "Policy Consideration and the International Judicial Process" 17 *Int'l & Comp. L.Q.* 58, 68 (1969)

¹⁰⁸ *Ibid*

¹⁰⁹ Hersch Lauterpacht, *The Function of Law in the International Community*, 75 (Connecticut: Archon Books, 1996)

¹¹⁰ Hersch Lauterpacht, "Decisions of Municipal Courts as a Source of International Law" 10 *Brit Y.B Int'l L.* 65, 85 (1929)

or custom applies. The writer has just discussed judicial legislation regarding treaties. In doing this, the writer has argued that lawmaking by the Court does not reveal itself only in the event of the absence of positive law, but also in the interpretation and application of positive law. The writer particularly identified some guises by which the Court legislates in the course of applying positive law. The relationship between judicial lawmaking and customary international law, having been discussed in chapter IV, the writer sees no need belabouring the discussion here.

7.5 Absence of Treaty or Customary Law

A major feature of international law is the absence of a central legislature to compulsorily make laws to govern the behaviour of States and regulate their conducts. This is a problem for international law which is in constant need of expansion to cover the challenges brought about by “the great shades of nuance that permeate international law”,¹¹¹ as it expands through globalisation, scientific discoveries, environmental degradation, terrorism, human rights etc. The absence of a legislative body with power to make international law, which is binding upon all States, makes it impossible for the law to continually develop in order to effectively meet the points of friction in the relations of States.

When conflicts arising from areas not yet covered by international law are submitted to the Court, should the Court declare that it is impossible for it to decide due to absence of applicable law or should it yet decide the matter despite the absence of a pre-existing rule of international law? The absence of international law governing a conflict between States is much more a problem for the Court than for any other organ of the United Nations. The other principal organs of the UN can adopt political solutions to disputes brought before them; they

¹¹¹ Declaration of Judge Bruno Simma in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, *Advisory Opinion of July 22, 2010*, 3, para 9

could also out rightly refuse to discuss a question submitted to them; or refer the matter to the Court for an opinion. The Court does not have such wide options. The only option opened to the Court (once properly seised), albeit in its contentious jurisdiction, is to decide the dispute in accordance with international law.¹¹²

If it was open to the Court to declare impossibility of deciding due to absence of law in its contentious jurisdiction, the Court would have been completely disabled in the performance of its judicial functions. It would have been practically impossible for the Court to sustain the idea of having an independent permanent judicial institution, insofar as there is no legislative organ under international law. Thinking along this line in 1967, Friedmann was of the view that:

Even at this day, international law, while aspiring to be a comprehensive system governing the conduct of nations in international relations, is a loose collection of customs, treaties, and some judicial decisions, supplemented, in the language of the statute of the international court, by ‘general principles of law recognised by civilized nations’, most of them still inarticulate. It can only survive by constantly expanding to meet new conditions, by a continuous interaction of law-finding and law-making, for there is no neat division between legislative, executive and judicial organs. The Nuremberg judgments are a conspicuous example of the making of new international law in form of judicial fiat.¹¹³

Although international law has made some remarkable progress since 1967 when Friedmann wrote, his view is still as relevant in contemporary times as it was at that time. This is remarkably so because the progress recorded by international law has mainly been brought about through the activities of international courts and tribunals. The major plank for the expansion of international law was laid when international Courts started recognising that

¹¹² The term in accordance with international law, though generally understood as meaning that the Court should decide a case by applying rules of international law; it could also mean that the Court is at liberty to decide the case without limit to the solution it adopts provided the solution is not contrary to international law.

¹¹³ Wolfgang G. Friedmann, “The Jurisprudential Implications of the South West Africa Case”, 6 Colum. J. Transnat’l L. 1, 6 (1967)

international law could directly confer rights on individuals as well as hold individuals directly accountable.

Given that the discussion about to begin proceeds on the acceptance of the possibility of the existence of gaps in the law, it is important, as a prelude to the discussion, to examine the thought that the international law is logically complete and preclusive of gaps. This thought is principally based on the *lotus case* presumption of, “what is not prohibited is permitted”. The writer shall now make some remarks on this before continuing with the discussion on judicial legislation in the event of a gap in the international law.

7.5.1 The *Lotus Case* Presumption

The so-called *Lotus case* presumption of what is not prohibited is permitted was adopted by the PCIJ in the case of *S.S. Lotus*.¹¹⁴ In the case, the Court was requested, in proceedings brought by France to determine whether Turkey had acted contrary to international law, for subjecting the French captain of the SS *Lotus* to criminal proceedings in pursuance of Turkish laws over a collision that occurred on the High Sea in which eight Turkish citizens died. The Court declared that in the absence of any principle of law precluding Turkey from instituting the proceedings, it must be concluded, by virtue of the discretion which international law leaves to every sovereign State that Turkey did not act in a manner contrary to the principles of international law.

Since the PCIJ applied the principle in the *Lotus case*, the ICJ has applied it in two cases. The first is *Nicaragua v. United States*,¹¹⁵ and the second is *Unilateral Declaration of Independence in Respect of Kosovo*.¹¹⁶ In *Nicaragua v. United States*,¹¹⁷ the Court held that

¹¹⁴ Note 34, pp. 18, 21 and 31

¹¹⁵ Note 40

¹¹⁶ Note 111

¹¹⁷ Note 40, p 135, Para 269

international law contains no rules other than such rules as may be accepted by the State concerned, by treaty or otherwise, whereby the level of armaments of a sovereign State can be limited. This was in response to the argument of the United States that the excessive militarization of Nicaragua was a demonstration of its aggressive intent towards her neighbours. In *Unilateral Declaration of Independence in Respect of Kosovo*,¹¹⁸ the Court was requested to determine whether the unilateral declaration of independence by Kosovo was in accordance with international law. In giving its opinion, the Court opined that the declaration of independence was not in violation of international law because international law contains no prohibition on the unilateral declaration of independence. The Court reached this conclusion on the premise that State practice points to the conclusion that international law contained no prohibition of declarations of independence.¹¹⁹ According to the Court:

... For the reasons already given, the Court considers that general international law contains no applicable prohibition of declarations of independence. Accordingly, it concludes that the declaration of independence of 17 February 2008 did not violate general international law.¹²⁰

The idea is that there cannot be a gap in international law as the *Lotus* case presumption resolves every gap in favour of permission for the subject to act as it pleases. In effect, the Court should give judgment for the respondent whenever the conduct called in question is not directly regulated by international law. Writing in favour of this presumption, Hans Kelsen suggested that what is regarded as a gap in the law by some writers is a situation where the law permits its subjects to act as they pleased concerning a particular subject. In his view:

That neither conventional nor customary international law is applicable to a concrete case is logically not possible. Existing international law can always be applied to a concrete case, that is to say, to the question as to whether a state ... is or is not obliged to behave in a certain way. If there is no norm of

¹¹⁸ Note 111

¹¹⁹ *Ibid*, p 29-30, para 79

¹²⁰ *Ibid*, p 32, para 84, p. 32

conventional and customary international law imposing upon the state the obligation to behave in a certain way, the subject is under international law legally free to behave as it pleases.¹²¹

In consequence,

The assumption that the law-applying organs are authorized to fill such gaps, by applying to the particular case norms other than those of existing conventional or customary international law, implies that the law-applying organs have the power to create new law for a concrete case if they consider the application of existing law as unsatisfactory. From this point of view of legal positivism, such a law-creating power must be based on a rule of positive international law. Whether there exists such a rule of general international law is doubtful, although many writers take it for granted that there are gaps in existing international law, and that the states or international agencies competent to apply international law are authorized to fill these gaps.¹²²

This writer does not share Kelsen's view. The *Lotus case* presumption tends to ignore the fact that though a particular act is not prohibited, by engaging in the act, a State may yet cause consequences forbidden by law. Lack of express prohibition does not always translate to legal permission, as the act may yet offend the law when it brings about consequences forbidden by law. For instance, by the decision of the Court in the *Unilateral Declaration of Independence*,¹²³ a unilateral declaration of independence is permitted insofar as it is not expressly prohibited by law. The Court would certainly take a different view if in the execution of unilateral declaration of independence, genocide or other crimes against humanity were committed. This was the dilemma the Court faced in the *Legality of the Threat or Use of Nuclear Weapons*.¹²⁴ Here, the Court found that there was no law expressly prohibiting the use or threat of nuclear weapons. Nevertheless, the Court could not conclude that States were at liberty to use the weapon as they pleased. This was because the Court found that the use of the weapons would offend legal prohibitions in other areas.

¹²¹ Hans Kelsen *Principles of International Law*, 438 (2nd edn., Robert W Tucker ed., 1966 Holt, Rinehart and Winston, Inc.)

¹²² *Ibid*, p. 438-439

¹²³ Note 111

¹²⁴ Advisory Opinion, ICJ Rep 1996, 226

Accordingly, the absence of legal prohibition of an act capable of provoking consequences prohibited by law is a gap waiting to be filled.

Also, the *Lotus case* presumption is an evasive approach to legal questions. Taking the *Unilateral Declaration of Independence*,¹²⁵ for instance, the answer given by the Court fell short of affirming whether the act of unilateral declaration of independence was actually lawful or not; i.e., whether an entity was legally permitted to unilaterally declare independence. The absence of prohibition, *per se*, would not mean that there are no associated rules from which the Court could determine the legality of the declaration of independence. Indeed, the Court itself acknowledged the progress that had occurred from the second half of the twentieth century as a result of the development of the international law of self-determination which the Court observed had been developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation.¹²⁶

The Court also acknowledged the existence of the territorial integrity principle as a conflicting rule (a Charter rule in article 2(4)) to the right to self determination; yet it failed to rationalise how the former could be displaced by the latter. This is in spite of the attention of the Court being called to the fact that the unilateral declaration of independence was unlawful because it violated the territorial integrity principle by dismembering a sovereign State.¹²⁷ But for the evasive outlet presented by the *Lotus case* presumption, it would have been interesting to see how the Court would resolve the conflict between the fundamental rule of territorial sovereignty and the equally fundamental rule of right to self-determination. The Court simply left this vital question hanging.

¹²⁵ Note 111

¹²⁶ *Ibid*, p. 29-30 , para 79

¹²⁷ Judge Abdul Koroma, *dissenting, Unilateral Declaration of Independence, ibid*, p. 7 para 21

The *Lotus case* presumption does not entirely owe its origin to the decision of the PCIJ in the *Lotus case*. Ricci-Bussati first canvassed this idea during the deliberations of the 1920 Advisory Committee of Jurists. He had argued, in effect, that there was no question of the Court acting as a legislator as legislation dealing with international law comes within the power of States. He thought the Court could always answer to the apparent lack of legal rules by declaring the absence of positive rule implying absence of international limitation on the freedom of the parties. By this he argued that a legal relation is established between the parties, as that which is not forbidden is allowed. He regarded this as one of the general principles of law which the Court shall have to apply. In conceiving how this rule shall be applied, he stated that if the Court finds that no rules existed concerning a case before it, the Court shall declare that one party has a right against the other, that the conduct of the accused is not contrary to law.¹²⁸ He gave an example with the question of the territorial sea. He stated that in the absence of a rule of international law which defined the limits of the territorial waters, if a question of this kind were brought before the Court, the Court must not accept one or the other of the different rules in force in the different countries; it must simply state that a rule generally admitted does not exist, and after this statement, that the rulings of different countries are equally legitimate in so far as they do not encroach on other principles, such as freedom of the seas.¹²⁹

This view was generally opposed by members of the Committee. In response to Ricci-Bussati's postulation, Hagerup had painted the following scenario: an English vessel arrives within three to four sea mile limit, off the Norwegian coast; Norway maintaining that her territorial water extends to a distance of four miles from the coast expels the English vessel; England brings the matter to Court in protests. He asked Ricci-Bussati whether the Court

¹²⁸ Process-Verbaux of the Proceedings of the Committee of Jurists June 16-July 24, 1920, p 314

¹²⁹ *Ibid*, p. 315

should declare that there was no cause of action because there existed no rules on the subject of territorial waters' extent.¹³⁰ Also Descamps thought that the consequence of the rule that what is not prohibited is permitted would be that the law is as made by the strong.¹³¹

It is, therefore, not surprising that the notion found expression in the *S.S Lotus case*, which was one of the earliest cases decided under the Statute. Perhaps, the Court was influenced by the same consideration as Ricci-Bussati: the consideration of the prevalence of the "international law of strict coexistence, itself a reflection of the vigour of the principle of State sovereignty".¹³² A situation far removed from the international law of today, which has become much less rigid. This is the ground upon which some Judges of the Court have challenged the presumption. According to Judge Alvarez the principle that States have the right to do everything which is not expressly forbidden by international law, though "formerly correct, in the days of absolute sovereignty, is no longer so at the present day".¹³³ Judge Simma sees it as the "old, tired view".¹³⁴ Indeed, the new complexion of international law casts serious doubt on the tenacity of the argument that there can be no gap in international law owing to the *Lotus case* presumption.

The corollary of the existence of gaps in the law manifests in two ways; when the presence of gaps is admitted, a court could remedy the gap or simply plead *non liquet*. If a *non liquet*, is declared, "the courts leave the disputed issue at large ... in the sense that they neither recognize nor reject the contended right or the contended duty".¹³⁵ On the other hand, the Court could confirm or reject the contended right or duty by filling the gap. We shall now discuss these alternatives.

¹³⁰ *Ibid*, p 319

¹³¹ *Ibid*, p. 322

¹³² Declaration of President Badjaoui in *Nuclear Weapons case*, note 124, p. 270 para 12

¹³³ *Separate Opinion, Fisheries Case (United Kingdom v. Norway)*, ICJ Rep 1957, 116, 152

¹³⁴ *Declaration of Judge Bruno Simma in Unilateral Declaration of Independence*, note 111, p 3, para 9

¹³⁵ Llmarr Tammelo "On the Logical Openness of the Legal Orders", 84 Am. J. Comp. L 187, 191 (1959)

7.5.2 *Non Lique*

There question whether international courts can adopt a rule to govern a claim for which there was no pre-existing rule of international law has been a live question since the advent of the institution of a permanent international court of justice. The answer to this question is somewhat controversial in theory, though a question with very little significance in practice. It usually presents itself in two folds. The first is that it is incumbent on international courts to decline to decide a case on the ground that rules are not available for its determination. The second is that a court, otherwise endowed with jurisdiction, must not refuse to give a decision on the ground that the law is nonexistent, or controversial, or uncertain or lacking in clarity.¹³⁶ The first answer affirms the *non lique* doctrine. The second affirms the direct opposite – the inadmissibility of *non lique*. In effect the latter view affirms the power of international courts to fill gaps in positive law in order to render a legal decision in every case brought before them.

The essence of the *non lique* rule is that an international court should not give a decision if the law is non-existent, controversial, or uncertain, or lacking in clarity.¹³⁷ It provides a basis for the view that an international court lacks the power “to develop, adapt and create rules of international law of new content”.¹³⁸ As Stone observed, what is urged by those who accept the existence of *non lique*, goes not merely to law-applying, but in a more important sense, also, to the law-creative competence of the Court over States.¹³⁹ The real issue arising from *non lique*, according to Stone, is that the Court must either declare a *non lique* or necessarily engage in creation of law by a judicial act of choice between more or less equally available

¹³⁶ Hersch Lauterpacht, “Some Observations on the Prohibition of *Non Lique* and the Completeness of the Law” in *Symbolae Verzijl*, 199 (1958) cited in LImar Tammelo, *ibid*, p. 84

¹³⁷ Julius Stone, note, 19, p.124

¹³⁸ *Ibid*, p. 125.

¹³⁹ *Ibid*, p. 132.

legal alternatives.¹⁴⁰ It thus exists to controvert the view that international judges could fill gaps in the law by finding legal answers to disputes submitted to them, absent pre-existing rules of law.

It is pertinent to state at this point, however, that the present writer does not intend to embrace a general discussion on the question of *non liquet* in relation to international tribunals. This has been eminently discussed by Hersch Lauterpacht¹⁴¹ and Julius Stone.¹⁴² These eminent Scholars discussed *non liquet*, not just in relation to the ICJ, but in its application to international courts and tribunals in general. The discussion of *non liquet* by these Scholars addressed the question of whether there is a prohibition of *non liquet* under international law. In his work Lauterpacht, argued that there is a general prohibition of *non liquet* in international law due to the completeness of the international legal order. This position was to some extent criticised by Stone. Though agreeing that there has never been a case where an international adjudicator declared *non-liquet*, he could not agree that a prohibition could arise from that fact.

Generally speaking, the present writer does not consider it necessary to belabour the point by continuing the argument concerning whether or not *non liquet* is prohibited under general international law in relation to both judicial and arbitral proceedings. The writer intends to draw inspirations from the works of these Scholars as he now focuses on *non liquet* only in relation to the ICJ.

¹⁴⁰ *Ibid.* Also see Prosper Weil “The Court Cannot Conclude Definitively ...’ Non Liqueur Revisited”, 36 Colum. J. Transnat’l L. 109, 110 (1998) (arguing that *non liquet* is the corollary of the expression of a gap, or lacuna in law and that the theories of lacunae in international law and of *non liquet* are two sides of the same coin).

¹⁴¹ Hersch Lauterpacht, “Some Observations, note 136

¹⁴² Julius Stone, note, 19

7.5.2 (a) As in the Statute of the Court

The first point to note is that there is no room for *non liquet* within the ICJ Statute paradigm of judicial settlement of disputes. This could be gathered from the express provisions relating to the contentious jurisdiction of the Court. There is strong support for this view in the wording of the opening paragraph of article 38. The paragraph provides, “the Court, whose function it is to decide in accordance with international law, such disputes as are submitted to it...”. There are two angles to this article: the first angle empowers the Court to decide disputes submitted to it; the second is that the decision must be in accordance with international law. The importance of these provisions would carry consideration weight when it is seen in the light of article 36, by which the jurisdiction of the Court is strictly voluntary.

Cases would not come to the Court except the parties had submitted to the jurisdiction of the Court in one way or the other. When States agree to submit their disputes to the Court, they do so in expectation of a decision. By necessary implication, they are submitting, not just to the jurisdiction of the Court as far as the existence of international law governing the dispute is available, but also with the belief that the Court would fashion out a legal solution, where none existed. This is indeed the essence of the second angle – the solution that the Court would adopt must be in accordance with international law. The fundamental question is that of jurisdiction and competence of the claim. When the Court finds its jurisdiction to exist in any particular case and the claim competent, it is expected that it would render a decision in accordance with international law.¹⁴³

¹⁴³ The difference between *non liquet* and admissibility must however be maintained. The former operates at the substantive stage while the latter is a threshold question. *Non liquet* arises only when a court is unable to decide a case for absence of law after the case had fulfilled the threshold requirements of jurisdiction and admissibility. This view is generally shared by writers. See Laurence Boisson de Chazoumes and Philips Sands, *International law, the International Court of Justice and Nuclear Weapons*, 155 (Cambridge University Press UK, 1999), (arguing that *non liquet* differs from a failure to decide a case on procedural or jurisdiction grounds); Hersch Lauterpacht, “Some Observations on the Prohibition of *Non Liquet* and the Completeness of the Law” in E. Lauterpacht ed., *International Law Collected Papers* vol. 2, 216 (Cambridge: Cambridge University Press, 1975) (stating that “It is only the refusal to give a decision after the Court had assumed jurisdiction is based

This view seems to enjoy the support of Publicists that command respect in matters of international law. Prosper Weil sees the avoidance of *non liquet* in international adjudication as an integral part of the consent-based character of the judicial settlement of international disputes.¹⁴⁴ He further argued that *non liquet* frustrates the will of the parties to have their disputes settled judicially because:

The principle of freedom to choose the means of settlement of international disputes, as well as the prominence given by the parties in a specific case to judicial settlement, would be defeated if an international tribunal were to pronounce a *non liquet* when it cannot find in the law a solution to the problem before it.¹⁴⁵

It has equally been argued that it is open to the Court to decide any case over which it has jurisdiction regardless of any gap in the applicable content of law as it stood immediately prior to the decision.¹⁴⁶

The Statute did not just make room for the avoidance of *non liquet*, it also provides the Court with the necessary tools that would enable the Court get out of a situation indicative of *non liquet*. By these tools – general principles of law (article 38(1)(c) and judicial decisions (article 38(1)(d) – the Court creates and develops the law to meet new situations. The fundamental role played by these tools had engaged the attention of several writers.

It has accordingly been observed that the view that article 38(1)(c) helps to remove the possibility of *non liquet* is by now widely accepted.¹⁴⁷ This view is corroborated by Judge

on absence or insufficiency of the applicable substantive law that the question of *non liquet* may properly be deemed to arise”.) Cf. Separate Opinion of Judge *Petran in Nuclear Tests (New Zealand v. France)* ICJ Rep 1974, 457 , (treating absence of law as a question of admissibility).

¹⁴⁴ Prosper Weil, note 140, p. 115

¹⁴⁵ *Ibid*, p. 115-116

¹⁴⁶ Julius Stone, note 22, p. 143

¹⁴⁷ Rosalyn Higgins, note 104, p. 67; Christopher A. Ford, “Judicial Discretion in International Jurisprudence: Article 38(1)(c) and General Principles of Law” 5 *Duke J. Comp. & Int’l L.* 35, 64 (1994-1995) (arguing that article 38 provided the Court with authority to invoke general principles in order to prevent *non liquet*). *Ibid*; Iain Scobbie, “Res Judicata, Precedent and the International Court of Justice: A Preliminary Sketch,” 20 *Aust. YBIL* 229, 300 (1999) (stating that the Advisory Committee of Jurists agreed on the inclusion of article 38(1)(c) in order to provide a guarantee against the Court declaring a *non liquet*); Georg Schwarzenberger, Forward to Cheng , xi cited in Ford Christopher, note 147, p 65, (arguing that general principles enables the Court to replenish the rules of international law by principles tested within the shelter of more mature and closely integrated legal system.)

Schwebel, who admitted that the inclusion of "the general principles of law recognized by civilized nations" in article 38 of the Statute of the Court by the Advisory Committee of Jurist was specifically devised to avoid what Descamps had termed "the blind alley of *non liquet*".¹⁴⁸

Concerning paragraph (d) of article 38(1), the writer is confident that its place has been very well established in this thesis and, therefore, needs no further elaboration at this moment. Save to say that the importance attached to article 38 (1)(c) does not depreciate the value of paragraph (d). Article 38 (1)(c) may well be the route through which general principles of private law are incorporated into international law. But once they have been applied by the Court they lose their identities to the case-law of the Court within the province of paragraph (d). Soon the principles/rules arising from the application of the general principles will be applied not as principles/rules of private law but as settled rules in the case-law of the Court. This view is ably supported by Judge McNair, who rightly declared that the Court does not apply private law sources, stock, lock and barrel, but modifies them to suit the international environment.¹⁴⁹ If the modified rule has no equivalent in customs or treaties, it would not be long before the rule is applied as a rule emanating from the case-law of the Court. It is from the case-law of the Court that the possibility of the rule becoming assimilated into customary international law arises.

As for advisory jurisdiction, a different consideration may apply. But the Court has been steadfast to its practice of creating and developing international law even in its advisory jurisdiction. Unlike its contentious jurisdiction, there is no provision in chapter IV (article 65-68)¹⁵⁰ imposing a duty to decide in accordance with international law. Rather, article 65 gives

¹⁴⁸ Dissenting, *Nuclear Weapons case*, note 124, p. 322

¹⁴⁹ *Separate Opinion in International Status of South West African*, note 5, p., 148

¹⁵⁰ This governs the advisory jurisdiction of the Court. The provisions of chapter IV is repeated in article 102 of the Rules of Court. (adopted on April 14 1978).

the Court discretion on whether to answer a question referred to it for an advisory opinion or to refuse to give an answer. However, article 68 allows the Court to be guided by the provisions of the Statute applicable in contentious cases, to the extent to which it recognizes them to be applicable. The relationship between *non liquet* and the practice of the Court is discussed in some details later.

7.5.2. (b) As in the Practice of the Court

It is refreshing to begin this discussion with the assertion of Gerald Fitzmaurice, who once declared:

It is axiomatic that courts of law must not legislate: nor do they overtly purport to do so. Yet it is truism that a constant process of development of the law goes on through the courts, a process which includes a considerable element of innovation ... in practice, courts hardly ever admit a *non liquet*. As is well known, they adapt existing principles to new facts or situations. If none serves, they in effect propound new ones by appealing to some antecedent or more fundamental concept, or by invoking doctrines in the light of which an essentially innovatory process can be carried out against a background of received legal precept.¹⁵¹

Gerald Fitzmaurice's opinion perfectly depicts the practice of the ICJ in relation to the development of international law. Indeed as generally observed by Fitzmaurice, from the PCIJ till date, there is no reported contentious case in which the Court declared *non liquet*. Neither is there any case in which States requested the Court to do so. This view has also been expressed by some Judges of the Court. In the *Nuclear Weapons Opinion*, Judge Higgins declared the "important and well-established principle that the concept of *non liquet* ... is no part of the Court's jurisprudence".¹⁵² In his Dissenting Opinion in the same case,

¹⁵¹ Gerald Fitzmaurice, "Judicial Innovation – Its Uses and its Peril" in *Cambridge Essays in International Law (Essays in Honour of Lord McNair)* pp 24-25 cited in Rosalyn Higgins, note 107, p. 68

¹⁵² *Dissenting*, note 124, p. 592 para 36

Judge Stephen M. Schwebel categorically stated that: “Neither predominant legal theory ... nor the precedent of this Court admits a holding of *non liquet*”.¹⁵³

The writer shall now consider *non liquet* in relation to the practice of the Court in its contentious and advisory jurisdictions.

7.5.2(b) (i). In the Contentious Jurisdiction of the Court

There is the argument that the Court declared *non liquet* in *Haya de la Torre*.¹⁵⁴ This writer disagrees with this argument.¹⁵⁵

Haya de la Torre case was a sequel to the *Colombian-Peruvian Asylum case*.¹⁵⁶ In the former case, the Court was called upon to specify which of the several means of terminating asylum was conducive to the implementation of the judgment of the Court in the *Asylum case*. In the *Asylum case*, the Court had declared that the diplomatic asylum granted to *Haya de la Torre* by Columbia in her Embassy in Lima was illegal, but the Court did not make a consequential order on how the asylum should be terminated. This was what prompted the *Haya de la Torre case*. The aim of the case was to obtain the interpretation of the *Asylum case*. The precise question was whether the *Asylum case* could be interpreted to mean that Columbia should terminate the asylum by surrendering *Haya de la Torre* to the Peruvian authorities, or whether Columbia could terminate the asylum in any other way.

In answering the question, the Court made it clear that the question concerning the surrendering of the refugee was not decided in the *Asylum case* because the question was not submitted to the Court. The Court held that it was not in a position to declare, merely on the basis of the *Asylum case*, whether Colombia is or is not bound to surrender the refugee to the

¹⁵³ *Ibid*, p 322

¹⁵⁴ ICJ Rep 1951, 71

¹⁵⁵ Siorat, “Le Probleme des Lacunes en droit International” (1959) cited in Julius Stone, note 22, p. 140-144.

¹⁵⁶ ICJ Rep 1950, 266

Peruvian authorities.¹⁵⁷ Also, the Court found that there were several modes of terminating asylum but that the Havana Convention operative between the parties, and upon which the *Asylum case* had been decided, was silent on the mode of terminating a political asylum, which had been irregularly granted.

The Court viewed the silence of the Convention as implying that it was intended to leave the adjustment of the consequences of the situation to decisions inspired by considerations of convenience or of simple political expediency.¹⁵⁸ Accordingly, while reiterating that Columbia should terminate the asylum in accordance with the judgment in the *Asylum case*, the Court declared by thirteen votes to one that Columbia was under no obligation to surrender the refugee to the Peruvian authorities.

It is on the refusal of the Court to specify a mode for the termination of the asylum that the argument that the Court indicated *non liquet* is based. However the hesitation of the Court to make a choice for the parties on the best way to terminate the asylum may be viewed, it does not, by the widest interpretation amount to *non liquet*. What the Court did in that case was simply to refuse to make a consequential order requesting Columbia to deliver *Haya de la Torre* to the Peruvian authorities.¹⁵⁹ Indeed, throughout the *Haya de la Torre* judgment, the Court made it clear that the question submitted to it in the *Haya de la Torre* case had not been decided in the *Asylum case*, which was the substantive case. In effect the Court was not in the position to reopen the *Asylum case* to determine the best means by which the asylum should be terminated.

Besides, it cannot even be said with certainty that there was a lacuna on the question before the Court. Granted that the Court admitted that the Havana Convention was silent on the

¹⁵⁷*Haya de la Torre*, note 172, p. 79

¹⁵⁸ *Ibid.*, p. 81

¹⁵⁹ *Ibid.*, p. 75

point, the silence of the Convention on the point cannot be read to mean that there was no rule of customary international law on which the Court could have relied to answer the question. The Court even went as far as giving an indication to the existence of a Latin American tradition touching on the issue. Indeed the Court affirmed that there was a “Latin-American tradition in regard to asylum, a tradition in accordance with which political refugees should not be surrendered”.¹⁶⁰ The Court also found that “[t]here is nothing in that tradition to indicate that an exception should be made where asylum has been irregularly granted [as was the Asylum case]”.¹⁶¹

If the Court was minded on deciding the issue, assuming it arose in the *Asylum case*, it would not be too far-fetched to assume that the Court would have applied the said Latin American tradition as a rule of customary international law prevailing between the parties, which are Latin American States.¹⁶² Given that it cannot certainly be said that the Court was faced with a gap in the law, it is wrong to argue that the Court declared *non liquet*, which can only arise when there is a gap in the law.

This view is in consonance with the view of Julius Stone. Stone observed, and importantly too, that since the *Haya de la Torre case* was not the real judgment submitted to the Court, but a request to seek the means for the execution of the judgment in the *Asylum case*, the Court did not refuse to decide the precise issue. He remarked that the case is not relevant to the *non liquet* question,¹⁶³ and that the approach of the Court in the case is more easily explained without reference to *non liquet* doctrine at all.¹⁶⁴

¹⁶⁰ *Ibid*, p. 81

¹⁶¹ *Ibid*

¹⁶² This view is not affected by the fact that the Court rejected the argument of Columbia in the *Asylum case*, note 174, pp 276 -278, on the existence of a custom regarding the unilateral qualification of asylum. The Court did not deny the existence of customary law of asylum, as a whole. What the Court found, not to have been established as a custom worthy of application between the parties, was the aspect relating to the unilateral and definitive qualification of asylum.

¹⁶³ See Julius Stone, note 22, p. 142

¹⁶⁴ *Ibid*

In view of the above, the argument that the Court declared *non liquet* in this case, strongly stands to be disputed.

7.5.2 (b)(ii) In the Advisory Jurisdiction of the Court

How does the point made above concerning the contentious jurisdiction of the Court fit into its advisory jurisdiction? To some extent, it may be argued that the Court may declare *non liquet* in its advisory jurisdiction. This, as hinted earlier, is because the Court is not under any obligation to render an opinion on questions of law submitted to it in its advisory jurisdiction. Whether or not to render an opinion is a discretionary matter for the Court. In addition, the Statute does not contemplate the submission of a dispute between States in advisory opinions: a dispute that would require resolution in accordance with international law. This point appears to have been taken into account in the Declaration of Judge Vladlen Vereshchetin, where he stated that the debate on *non liquet* has been predominant in respect of the contentious jurisdiction of the Court in which the Court is required to pronounce a binding, definite decision settling the dispute between the parties.¹⁶⁵ While appearing to argue that the Court could declare *non liquet* in its advisory opinion, Judge Vereshchetin pointed out that the Court is not requested to resolve an actual dispute between actual parties, but to state the law as it finds it at the present stage of its development.¹⁶⁶ On the other hand, Mohammed Shahabuddeen is unwilling to draw a distinction between advisory and contentious jurisdictions for the purpose of *non liquet*. He reasoned that the law to be applied was the same whether a Court is operating within its advisory or contentious jurisdiction.¹⁶⁷

¹⁶⁵ *Nuclear Weapons case*, note 124, p. 279

¹⁶⁶ *Ibid*, p. 279

¹⁶⁷ Dissenting, *Nuclear Weapons case*, *ibid*, p. 309

It appears to this writer, from the point just made, that the advisory jurisdiction of the Court does not provide an appropriate forum for determining the existence of *non liquet*. This is because questions seeking the Courts attention are usually couched in abstract terms. An act may be legal or illegal in its abstract and general term but may be otherwise when it is considered in relation to a concrete case. For instance, a court, when faced with a legal question whether the killing of a man is murder, may simple return an answer saying that it is murder. But the Court would certainly take a different view if presented with a concrete case where the killing was carried out in self-defence or where it occurred by accident. In what appears to be a confirmation of this, it was wondered in the advisory opinion in the *Western Sahara case*:

whether the Court has before it sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character.¹⁶⁸

This abstract attribute of advisory opinions was the difficulty of the Court in the *Nuclear Weapons case*.¹⁶⁹ It was in consequence of this that the Court reached its conclusion in paragraph 2E of its Opinion. In this paragraph the Court opined that,

in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹⁷⁰

¹⁶⁸ ICJ Rep 1975, 12, 28-29, para 46

¹⁶⁹ Note 124

¹⁷⁰ *Ibid*, p. 226

This was regarded as an indication of *non liquet* by a number of the Judges who heard the case,¹⁷¹ just as some writers also believe. Nonetheless, if the language of the paragraph was allowed to speak for itself, it would be clear that the Court adopted the paragraph in view of the abstract “elements of facts at its disposal”.¹⁷² Indications that the situation would have been different, if the Court was deciding a case in which nuclear weapons had been threatened or used are numerous in the judgment. Indeed the Court would have been able to rely on the various rules (such as the law and custom of war, the rule of proportionality etc), which the Court had found to be applicable to the use of nuclear weapons, to determine whether the threat or use was lawful or unlawful. This case is discussed in more detail below.

Despite the general problem of the abstract formulation of legal questions in advisory jurisdiction, in practice, article 68 of its Statute allows the Court to be guided by the provisions of the Statute, as it applies in contentious cases, to the extent to which it recognizes them to be applicable. Accordingly, the Court has, as close as practicable, recognised and applied rules applicable in contentious jurisdiction to advisory jurisdiction.¹⁷³

The Court has persistently maintained that though its advisory jurisdiction “represents its participation in the activities of the [UN] Organization”,¹⁷⁴ it participates in the activities of the organisation “as a court of justice”.¹⁷⁵ The Court has also been quick to point out that it is a judicial body and that in the exercise of its advisory functions, it is bound to remain faithful

¹⁷¹ *Declaration of the President, Mohammed Bedjaoui* (p. 269, para 8) (stating that there was no immediate and clear answer to the question); *Declaration of Judge Vladlen Vereshchet* (p. 279) (stating that paragraph 2E “admits the existence of a “grey area” in the present regulation of the matter”); *Dissenting Opinion of Rosalyn Higgins* (p. 590, para 30) (stating that it is not in doubt that the formula chosen was *non liquet*). Also a number of writers share the thought that *non liquet* was declared. See Prosper Weil, note 140, p. 117, (stating that “non liquet was the Court’s main answer..”.)

¹⁷² In support of this view see Laurence Boisson de Chazoumes and Philip Sands, note 143, p. 153 (though conceding that a plausible reading of the opinion is an indication of *non liquet*, they argued that the opinion of the Court need not be interpreted as indicating *non liquet* because the Court attributed its non decision, “... to the element of facts at its disposal”.)

¹⁷³ In *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, ICJ Rep, 1950 65, 72, the Court affirmed that article 68 gives it a large margin of discretion in the extent to which it is to be guided in its advisory jurisdiction by rules application in its contentious jurisdiction.

¹⁷⁴ *Ibid*, p. 71

¹⁷⁵ Separate Opinion of Mohamed Shahabuddeen, *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations*, Advisory Opinion, ICJ Rep 1989 177, 213

to the requirements of its judicial character.¹⁷⁶ Also, that being a Court of justice, the Court cannot depart from the essential rules guiding its activity;¹⁷⁷ it exercises its advisory jurisdiction as a judicial function.¹⁷⁸

This, perhaps, explains the reason the Court has strived to provide legal answers to questions referred to it in its advisory jurisdiction, notwithstanding the problem arising from the abstract nature of the questions formulated for opinions. The Court has thus assimilated its advisory jurisdiction as closely as possible to its contentious jurisdiction. As far as the Court remains faithful to the application of international law, the Court does not bother itself with whether it is dealing with a “dispute submitted to it”¹⁷⁹ or “a legal question”,¹⁸⁰ the Court attaches the same consideration to both – the consideration of application of appropriate rules of international law. By the deliberate choice of the Court, therefore, and through the power granted it by article 68, the Court has established a practice of not declaring *non liquet* in its advisory jurisdiction when confronted with questions not covered by international law, albeit how unsatisfactory the answer given by the Court may be.

This is even so, as the Court sometimes renders decisions within a purely advisory jurisdiction. Such a decision was rendered by the Court in the *Eastern Carelia case*.¹⁸¹ In that case, the refusal of the Court to render an opinion and the grounds upon which that refusal was based was itself a decision which had to be considered in subsequent cases. In the *Nuclear Weapons case*,¹⁸² the legal question presented to the Court was whether the use or threat of nuclear weapons under any circumstances was lawful. In answering this question,

¹⁷⁶ *Judgments of the Administrative Tribunal of the I.L.O. Upon Complaints Made Against the U.N.E.S.C.O.*, Advisory Opinion, 1956 ICJ Rep, 77, 84

¹⁷⁷ *Certain Expenses of the United Nations*, Advisory Opinion ICJ Rep 1962, 159; *Status of Eastern Carelia*, Advisory Opinion, PCIJ, Series B, No. 5, p. 29

¹⁷⁸ *Northern Cameroons case (Cameroon v. United Kingdom)*, Preliminary Objections, ICJ Rep 1963, 15, 30.

¹⁷⁹ Article 38 of the Statute of the Court

¹⁸⁰ *Ibid*, Article 65

¹⁸¹ Note 195.; also see pp. 150-152 of this work

¹⁸² Note 124

the Court analysed the existing conventional and customary law on the use of force as they relate to the laws and customs of war,¹⁸³ neutrality, territorial integrity, self-defence as well as laws governing the use of chemical and biological weapons in warfare. In all of these laws, however, the Court could not find, and rightly too, any law specifically authorising or prohibiting the use of nuclear weapons. But through analogies from the general principles arising from the laws, the Court found the use of nuclear weapons to be within the prohibition in article 2(4) of the United Nations Charter. The Court also found that the use of nuclear weapons in self-defence was conditioned by the rules of proportionality and humanitarian international law.¹⁸⁴

The sore point of the deposit of the Court was paragraph E. For its relevance to this discussion, the writer feels inclined to quote this paragraph again, though at the risk of repetition. In it, the Court opined:

It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law; However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.¹⁸⁵

It could actually be argued, though not with absolute certainty, that the Court declared *non liquet* in the second limb of paragraph E. But from the totality of the case and the reasoning of the Court and of the individual Judges, it is the argument of this writer that the Court did not really declare *non liquet*.

¹⁸³ As incorporated into the Second Hague Declaration of July 29, 1899, the Hague Convention of October 18, 1907 and the Geneva Protocol of June 17, 1925

¹⁸⁴ Note 124, p. 226

¹⁸⁵ *Ibid*

In furtherance of this viewpoint, it is important to note at the outset that paragraph 2E was adopted as a majority opinion with great hesitation on the part of the Judges. The very obvious part of this hesitation is the fact that the depositif was adopted by the casting vote of the President of the Court: a very slim majority. What is not so obvious to many writers is that a number of Judges did not actually vote for the controversial second limb. They actually voted for the first. Also, a number of the Judges did not vote in favour of the paragraph to declare *non liquet*, because (as shown below) a good majority of the Judges were firmly of the view that, though the threat or use of nuclear weapons was not prohibited, *per se*, its prohibition was inferable from existing rules of international law.

Let us take a quick look at the reasons some of the Judges voted in favour of paragraph 2E. In his Declaration, Judge Herczegh voted for paragraph 2E though he thought it had not “summarized more accurately the current state of international law regarding the question of the threat or use of nuclear weapons ‘in any circumstance”, because to have voted against this paragraph would have meant adopting a negative stance on certain essential conclusions alluded to in the first limb of the paragraph.¹⁸⁶ It is worth stating that the same Judge was of the firm view that:

The fundamental principles of international humanitarian law, rightly emphasized in the reasons of the Advisory Opinion, categorically and unequivocally prohibit the use of weapons of mass destruction, including nuclear weapons. International humanitarian law does not recognize any exceptions to these principles.¹⁸⁷

In effect, it cannot be said from the totality of the declaration of the Judge that *non liquet* was within his reasoning when he voted for that article. This is obvious from his finding that fundamental principles of international humanitarian law categorically and unequivocally prohibit the use of nuclear weapons. On the contrary, the Judge was more concerned with

¹⁸⁶ *Ibid*, p. 275-6

¹⁸⁷ *Ibid*, p. 275

preserving the first limb of the paragraph. Judge Bedjaoui (the President of the Court), though voted in favour of paragraph 2E, also explained that the survival of a State, though equally a fundamental norm as humanitarian law cannot be placed above, “the ‘intransgressible’ norms of international humanitarian law”.¹⁸⁸ Also, while voting in favour of the paragraph, Judge Ferrari Bravo said he was deeply dissatisfied with certain crucial passages of the decision, which he described as “not very courageous”.¹⁸⁹ He opined that the use of nuclear weapons being contrary to rules of humanitarian international law, it “becomes *automatically* unlawful as being quite out of keeping with the majority of the rules of international law”.¹⁹⁰ In his Separate Opinion, Judge Ranjeval made it very clear that he actually intended voting in favour of only the first limb of paragraph 2E, but that he had to vote for the whole paragraph because the rules of Court would not allow him vote for the first and not the second limb.¹⁹¹ To confirm this view he actually discredited the second limb by declaring that the use of nuclear weapons in extreme case of self defence was illegal.¹⁹²

This is why the writer has contended that the majority did not actually vote for the second limb suggestive of *non liquet*. It thus appears that a number of the Judges were ambushed by the merger of the first limb (which would have had a unanimous vote) with the second limb (which would have been voted against by a near unanimity). It is also clear that the declaration of *non liquet* was not operating in the reasoning of most of the Judges who voted for paragraph 2E.

Viewed from this perspective, the writer is inclined towards the view variously made by some of the Judges in the case that there was indeed no ground for the declaration of *non*

¹⁸⁸ Declaration of the President, Mohammed Bedjaoui, *ibid*, p. 273, para 22

¹⁸⁹ Declaration of Judge Ferrari Bravo, *ibid*, p. 273, 282

¹⁹⁰ *Ibid*, p. 285

¹⁹¹ *Ibid*, p. 304

¹⁹² *Ibid*, p. 303

liquet, since the Court had, by its own showing, proved that there were laws suited for the regulation of the threat or use of nuclear weapons, albeit indirectly or by analogy.

The view that there was no occasion for *non liquet* in the questions presented to the Court was shared by Judges Schwebel, Higgins, Koroma and Shahabuddeen. Judge Koroma specifically stated that a finding of *non liquet* was wholly unfounded in the case on the ground that, contrary to the suggestion that may flow from the opinion of the Court that there was a gap in the law, the opinion did not call for the application of new principles, as there were existing laws for the Court to apply.¹⁹³ Judge Shahabuddeen declared that there was no gap calling for the declaration of *non liquet*.¹⁹⁴ He argued that “to attract the idea of a *non liquet* in this case, it would have to be shown that there is a gap in the applicability of whatever may be the correct principles regulating the question as to the circumstances in which a State may be considered as having or as not having a right to act”.¹⁹⁵ The same view resonated throughout the opinions of Judges Higgins and Schwebel. In Rosalyn Higgins’ view, the Court simply failed to “take principles of general application, to elaborate their meaning and to apply them to specific situations”.¹⁹⁶

If Higgins’ view could be taken further, the question the writer may ask is whether the “extremity” with which the Court amplified the Charter-right to self-defence removed self-defence from the general rule of proportionality, discrimination and unnecessary suffering of civilian populations and enemy combatants? Interestingly, the Court had stated from the outset that its functions required it to adapt the law to new situations by specifying its scope and noting its general trend. According to the Court:

¹⁹³ *Dissenting, ibid*, p 558

¹⁹⁴ *Dissenting, ibid*, p 389

¹⁹⁵ *Ibid*, 389-390

¹⁹⁶ *Dissenting, ibid*, p. 591 para 32

The contention that the giving of an answer to the question posed would require the Court to legislate is based on a supposition that the present *corpus juris* is devoid of relevant rules in this matter. The Court could not accede to this argument; it states the existing law and does not legislate. This is so even if, in stating and applying the law, the Court necessarily has to specify its scope and sometimes note its general trend.¹⁹⁷

Clearly, this was exactly the duty the Court refused to perform in paragraph 2E. This point was well made by Judge Vereshchetin, who incidentally voted for paragraph 2E. In his words:

It is plausible that by inference, implication or analogy, the Court (and this is what some States in their written and oral statements had exhorted it to do) could have deduced from the aforesaid a general rule comprehensively proscribing the threat or use of nuclear weapons, without leaving room for any "grey area", even an exceptional one.¹⁹⁸

While laying so much emphasis on the seeming *non liquet* in the *Nuclear Weapons case*, it makes for a balance argument to also recall that before and after the above advisory opinion, the Court had severally developed the law to fill gaps rather than plead *non liquet*, even in advisory opinions.¹⁹⁹ The general approach of the Court outweighs the uncertainty in the approach of the Court in the isolated *Nuclear Weapons case*.

In summing up the points made above, the writer wishes to emphasise that the Statute of the Court did not expressly prohibit *non liquet*. Nonetheless, it made it impossible for the Court to declare *non liquet* in contentious proceedings and created room for the same approach in its advisory jurisdiction. The Statute achieved this by including general principles of law (paragraph c) and judicial decisions (paragraph d) of article 38(1) as sources of laws to be applied by the Court. These sources have been the pretty handmaids assisting the Courts to reach decisions "in accordance with international law", even in first impression cases.

¹⁹⁷ *Nuclear Weapons case, ibid*, p 237 para 18

¹⁹⁸ Declaration of Vladlen Vereshchetin in *Nuclear Weapons case, ibid*, p. 280

¹⁹⁹ Find instances of this in pages 310-319 below

Having said that, it is pertinent to recall the point made at the beginning of this section that the absence of positive law leaves the Court with two possibilities in the alternative – it could declare *non liquet*; or it could fill the gap and render a decision. Given that the Statute of the Court prevents it from declaring *non liquet*, the only option open to the Court in cases submitted to it is that of rendering decisions. The writer shall now examine how the Court goes about this alternative.

7.5.3 The Court Fills Gaps in Existing Law

In the course of this part, the writer has made two important findings. The first is that international law is not logically complete and is thus not preclusive of gaps; the second is that there is no room for the declaration of *non liquet*, albeit, in the contentious jurisdiction of the Court. These two findings point to one predictable conclusion – that gaps do inevitably arise in the Course of the Court’s functions, but that the Court is entitled, as it has always done, to fill the gaps and do justice.

The practice of filling gaps in the law in the course of settling a dispute is not peculiar to the ICJ. This power was already being exercised by arbitral tribunals even before the PCIJ was established. It should be recalled that Descamps, the President of the 1920 Advisory Committee of Jurists, alluded to the 1902 *California Pious Arbitration*,²⁰⁰ in which the Permanent Court of Arbitration (PCA) affirmed its power to seek and apply just principles in international settlement of dispute. In the arbitration, the Arbitrators acknowledged that the controversy, being between States, shall have to be determined on the basis of treaties and principles of international law. Nonetheless, the arbitrators resorted to the private law concept of *res judicata* to fill gaps in the law.

²⁰⁰*The Pious Fund of Californias (United States of America v. The United Mexican States). The Award of the Permanent Court of Arbitration in the Matter of the Pious Fund of the Californias*, rendered October 14, 1902

The fact that international tribunals fill gaps in positive law was also noted in the dissenting opinion of Judge Koroma in the *Nuclear Weapons case*.²⁰¹ In the case, the Judge called to mind the British-American Claims Arbitral Tribunal in the *Eastern Extension, Australia and China Telegraph Company*, where it was declared:

International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find - exactly as in the mathematical sciences - the solution of the problem. This is the method of jurisprudence; it is the method by which the law has been gradually evolved in every country, resulting in the definition and settlement of legal relations as well between States as between private individuals.

In agreement with the approach of the Arbitrators in the above arbitral award, Judge Koroma admitted that the practice espoused by the arbitral tribunal has been the jurisprudential approach to issues before the ICJ. The Judge further admitted that the Court had in the past applied legal principles and rules to resolve the conflict of opposing rights and interests where no specific provision of the law existed, and had relied on the corollaries of general principles in order to find solutions to problems. The Judge admitted that the approach of the Court has not been to restrict itself to a search for a specific treaty or rule of customary law specifically regulating or applying to a matter before it, but that the Court had referred to the principles of international law, to equity and to its own jurisprudence in order to define and settle the legal issues referred to it.²⁰²

To bring this to light, the writer shall in addition to the guises employed for judicial legislation earlier discussed, now discuss some other guises employed by the Court to make law while maintaining its deniability. It is important to state that the earlier discussion was focused on lawmaking in the application of positive law. The writer's focus here is on the

²⁰¹ Note 124, Judge Koroma, dissenting, at 575, citing the United Nations, Reports of International Arbitral Awards, vol. VI, pp. 114-115.

²⁰² *Ibid*, p. 576

common guises which the Court employs when resolving disputes in areas not previously covered by law.

7.6 Other Guises for Judicial Legislation by the ICJ

7.6.1 Law Making Through General Principles of Law

By article 38(1)(c), the Court is permitted to draw analogies from general principles of private law recognised by civilised nations. Giving that international law is a less mature system than municipal law, the Court has developed several areas of international law through principles adopted from private law sources. The Court has found this avenue quite useful in a number of cases. In *the Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*,²⁰³ the Court answered to the objection that the General Assembly was inherently incapable of creating a subordinate body competent to make decisions binding its creator, by drawing analogy from national laws, under which national legislatures create courts with the capacity to render decisions legally binding on the legislature which brought them into being.²⁰⁴

The creativity of the Court in relation to the application of private law sources markedly lies in the fact that when the Court has recourse to private law, it does not just apply it hook-line and sinker. It inevitably modifies the private law principle to suit States as against the very different entity – individuals – to whom private law applies. The view expressed by McNair in the *International Status of South West African* is very instructive to the point being made.

In his words:

What is the duty of an international tribunal when confronted with a new legal institution the object and terminology of which are reminiscent of the rules and institutions of private law? To what extent is it useful or necessary

²⁰³ Advisory Opinion, ICJ Rep 1954, 47, 621

²⁰⁴ *Ibid*, p. 621

to examine what may at first sight appear to be relevant analogies in private law systems and draw help and inspiration from them? International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38 (1) (c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to "apply (c) the general principles of law recognized by civilized nations". The way in which international law borrows from this source is not by means of importing private law institutions "lock, stock and barrel", ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of "the general principles of law". In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.²⁰⁵

The Court has also shown that it approaches the application of private law rules in analogous areas with great care. The Court is particularly careful where a particular concept may carry different factual and legal elements in international law to its content in municipal law. The Court found itself in this situation in the *International Status of South West Africa*.²⁰⁶ Here the Court found that international "Mandate" had only the name in common with the several notions of mandate in national law. The Court found the differences to be that the object of the Mandate regulated by international rules far exceeded that of contractual relations regulated by national law. Also, that as against the notion of mandate in municipal law, the mandatory power, the Union of South Africa, being a member of the League of Nations was a joint principal²⁰⁷ and not just a trustee. Accordingly, the Court opined that it was not possible to draw any conclusion by analogy from the notions of mandate in national law or from any other legal conception of that law.²⁰⁸

²⁰⁵ *Separate Opinion, Status of South West African*, note 5, p 148

²⁰⁶ *Ibid*, p. 139

²⁰⁷ *Ibid*, p. 151

²⁰⁸ *Ibid*, p 139

7.6.2 Lawmaking Through Corollaries of General Principles

It may happen that a claim before the Court is not directly governed by any rule/principle of international law. There may, nonetheless, be general rule/principles, the existence of which would make it impossible for the law to develop in a direction which conflicts with that rule/principle. From the existence of a general rule/principle the Court is able to glean a new law to govern a novel area interrelated to the area regulated by the general principle.

In *Barcelona Traction, Light and Power Company Ltd*, in discussing the obligations of States in the field of human rights, the Court stated that all States have a legal interest in their protection because the obligations are held towards the international community, *erga omnes*. The reasoning of the Court shows that the Court accepted this legal obligation as a corollary of the importance modern international law attaches to human rights as evidenced by the robust body of international law in that field. Hence, the Court stated that the rule it was stating, “derive[s] ... from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination”.²⁰⁹ In what clearly showed that the Court was stating the obligation that all States have a legal interest in the protection of human rights, as a corollary of the corpus of human rights law, the Court emphasised that “some of the corresponding rights of protection have entered into the body of general international law ...”²¹⁰

²⁰⁹ (2nd Phase) ICJ Rep 1970, 3, 32 para 34

²¹⁰ *Ibid*, p. 32 para 34

7.6.3 Law by Reference to General Principles of International Law

The Court has often developed rules of international law by reference to “general principles of international law”. This is different from what is contained in article 38(1)(c) which is basically understood to refer to private law principles recognised by civilised nations. In the frequency of occasions in which the Court had referred to rules contained in general principles of international law, the Court takes it for granted that such principles already existed as principles of international law even when it should be obvious that there is no ground for justifying the prior existence of such principles.

In *Competence of the ILO to Regulate, Incidentally, the Personal Work of the Employer*,²¹¹ the PCIJ was asked to answer the question whether it was within the competence of the ILO to propose labour legislations which, while protecting certain classes of workers, incidentally regulates the same work when carried out by an employer himself. The Court declared that though the enabling Treaty of Versailles did not expressly grant the ILO the power to regulate work carried out by an employer, the power could be inferred from the broad powers given to the organisation to propose the legislation for the protection of wage earners.

When, subsequently, the ICJ was asked to answer the question whether the UN can bring an international claim, the Court reformulated the decision in the *Competence of the ILO*, to the effect that under international law, an organisation:

must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties.²¹²

²¹¹ Series B – No. 13, p. 18

²¹² *Reparation case*, p 182

In other words, the Court was content to apply the presumption as a general rule of international law, without justifying the prior existence of the rule before it was applied by the PCIJ.

Lawmaking by reference to general principles of international law has proved to be a very useful device in the practice of the Court. In *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, the Court established that the South-West African Mandate was susceptible to termination for the misconduct of the mandatory power, as a “general principle of law”.²¹³ In *Treatment of Polish Nationals and other Persons of Polish Origin or Speech in the Danzig Territory*,²¹⁴ the Court established the supremacy of international law over national law before international courts as a “generally accepted principle”. In *Certain German Interests in Polish Upper Silesia*, the principle of respect for vested rights formed part of “generally accepted international law”.²¹⁵ In *Corfu Channel*,²¹⁶ the Court referred to “certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war”, as the basis of the obligation of Albania to notify other States of the presence of minefield in her territorial waters. In *Arrest Warrant of 11 April 2000*,²¹⁷ the Court relied on the *Factory at Chorzow case*²¹⁸ to the effect that:

[t]he essential principle contained in the actual notion of an illegal act - a principle which seems to be established by international practice and in particular by the decisions of arbitral tribunals – is that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed.

²¹³ Note 10, p. 47, para 96

²¹⁴ Series A/B No. 44 PCIJ, p 24

²¹⁵ Merits, 7 Series A No. 7, p. 42

²¹⁶ (*United Kingdom v. Albania*), ICJ Rep 1949, 4, 22

²¹⁷ *DRC v. Belgium*, ICJ Rep 2000, 3, 31-32, para 76

²¹⁸ PCIJ series A. No 17, p. 47

In all of the cases referred to above, the principles referred to as “general principles” owe their origin to neither treaties nor customs. The term is mostly employed to disguise judicial legislation.

7.7 Some Aspects of the Development of International Law by the ICJ

7.7.1 Reservations

In the *Reservations to the Convention for the Prevention and Punishment of Genocide*,²¹⁹ the main legal question referred to the Court was whether a reserving State can be regarded as a party to the Convention while still maintaining its reservation if the reservation is objected to by one or more of the parties to the Convention but not by others. Absent any rule of conventional law on the point, as the Vienna Convention on the Law of Treaties was yet to be made, this question required the Court to examine the existing rules of customary international law.

In the course of examining the rules, the Court admitted the existence of “the absolute integrity of the treaty rule”. Under this rule, a reservation must receive the express or tacit approval of all the parties to a convention for it to be valid. The Court denied that this rule existed as rule of customary international law, declaring that:

On the other hand, it has been argued that there exists a rule of international law subjecting the effect of a reservation to the express or tacit assent of all the contracting parties. This theory rests essentially on a contractual conception of the absolute integrity of the convention as adopted. This view, however, cannot prevail if, having regard to the character of the convention, its purpose and its mode of adoption, it can be established that the parties intended to derogate from that rule by admitting the faculty to make reservations thereto. It does not appear, moreover, that the conception of the absolute integrity of a convention has been transformed into a rule of international law. The considerable part which tacit assent has always played in estimating the effect which is to be given to reservations scarcely permits one to state that such a rule exists, determining with sufficient precision the effect of objections made

²¹⁹Advisory Opinion, ICJ Rep 1951, 15

to reservations. In fact, the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule.²²⁰

The Court further opined that a reservation needs not to be accepted by all the parties to a multilateral Convention. It stated that insofar as the reservation is accepted by some parties to the Convention, the reserving State becomes a party to the Convention *vis a vis* the accepting States, provided the reservation does not affect the object and purpose of the Convention.²²¹ In formulating the object and purpose of the convention rule, the Court declared that the object and purpose of the Convention limits both the freedom of making reservations and that of objecting to them. The Court further declared that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation.²²²

As rightly observed by the dissenting judges, beyond claiming that the object and purpose rule was the prevailing rule of custom, the judgment of the Court fell short of justifying the existence of the rule as a pre-existing rule of customary law, both in the practice and *opinio juris* of States. All the Court was able to lay claim on was that there was in existence among American States, a practice which permitted reserving States to be parties to a treaty, irrespective of the nature of the reservations or of the objection raised by the other parties.²²³ On the other hand, it was clearly shown by the dissenting judges that the prevailing practice was actually the absolute integrity of the convention rule. In the joint dissenting opinion of Judges Guerrero, Sir Arnold McNair, Judge Read, Judge Hsu Mo,²²⁴ the Judges gave a long and convincing history of the existence of the absolute integrity of the convention rule. They relied on the practice of States respecting certain conventions and the opinion of writers.

²²⁰*Ibid*, p. 24-25

²²¹*Ibid*, p. 31-32 para 53

²²²*Ibid*, p. 24

²²³*Ibid*, p 25

²²⁴*Ibid*

They also showed that the rule had also been followed by the League of Nations and the United Nations.²²⁵ The joint dissenting Judges emphatically declared that the judgment of the Court:

propounds a new rule for which we can find no legal basis. We can discover no trace of any authority in any decision of this Court or of the Permanent Court of International Justice or any other international tribunal, or in any text-book, in support of the existence of such a distinction between the provisions of a treaty for the purpose of making reservations, or of a power being conferred upon a state to make such a distinction and base a reservation upon it. Nor can we find any evidence, in the law and practice of the United Nations, of any such distinction or power.²²⁶

Whatever the status of the absolute integrity rule before the *Reservations case*, it can only exist as an exception to the object and purpose rule which was formulated by the Court in that opinion. The object and purpose rule was incorporated into article 19(c) and 20 of the 1969 Vienna Convention on the Law of Treaties as a general rule governing reservations made by parties to the Convention.

However, the application of the rule as a rule of law in the case-law of the Court has a wider scope than its application in the Vienna Convention. That is because a number of States to which the rule now applies as a rule of customary international law are not parties to the Vienna Convention. Thus from a humble beginning in the case-law of the Court, the rule has metamorphosed into a rule of treaty and customary law. Of course, it is clear from the totality of the argument and the reasoning of the Court in the *Reservations opinion* that prior to the opinion the rule was not in existence. The practice among American States to which the Court alluded was different to the object and purpose rule enunciated by the Court and could, therefore, not be the legal basis for the object and purpose rule.

²²⁵ *Ibid*, p. 32-36

²²⁶ *Ibid*, p 42-43. On his part, Judge Alvarez (*Ibid*, dissenting, p. 54.), thought the Court adopted a new system.

7.7.2. The Legal Nature of Unilateral Undertaking

The rules relating to the obligatory nature of unilateral statements are not contained in any convention or customary international law. The nature of unilateral statements, as constituting a binding obligation towards the whole world by a party making same was first considered by the ICJ in the *Nuclear Test cases*,²²⁷ in a manner and reasoning reminiscent of the English Court in *Carlill v. Carbolic Smoke Ball Co.*²²⁸ In the *Nuclear Test cases*, Australia and New Zealand had brought two separate actions before the ICJ to request the Court to order France to stop its atmospheric nuclear tests in the South Pacific Ocean, given the adverse environmental effects of the tests on the Australian Continent. In the course of the separate actions, France, which had refused to participate in the proceedings, made several public statements in which it assured that it will no longer perform atmospheric nuclear tests. The Court relied on these statements, particularly that made by the President of France. Without citing any authority, the Court reasoned that:

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo*, nor any subsequent acceptance of the declaration, nor even

²²⁷ *New Zealand v. France*, ICJ 1974, 457; *Australia v. France*, ICJ Reps, 253. for a detailed discussion of this aspect of the cases, see Amos O. Enabulele, "The Aura of Unilateral Statements in International Law: Nuclear Tests Cases Revisited" 6(1) *Hanse Law Rev* 53 (2010); also see Editorial Comments: "Words Made Law: The Decision of the ICJ in the Nuclear Test Cases" , 69 *Am. J. Int'l L* 612, 615 (1975) (stating that to the extent that the *Nuclear Test case* makes new law, it is in recognising that a written or verbal undertaking may give rise to legal rights to the whole community of States, even when made without reciprocal mutual exchange of commitments.)

²²⁸ [1893] 1 QB 256 CA. In this case, it was held that the Respondent, which had made an advertisement holding forth the potency of its product, had made an offer to the whole world. And that the Plaintiff accepted the offer when she bought the product and used it as advertised but yet contracted influenza, which the product was advertised to prevent.

any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.²²⁹

Based on this reasoning, the Court declared that the claims of the respective Applicant had been rendered moot by the said statements and thus refused to make any pronouncement on the claims of the parties. By this decision, the Court, like the English Court in the *Carlill v. Carbolic Smoke Ball Co.*,²³⁰ established the binding nature of unilateral statements, as an obligation to the whole world.

After the *Nuclear Tests cases*, there have been instances where litigating States requested the Court to apply the rule to their cases. In the *Nicaragua case*,²³¹ the Court was urged to apply the rule to a statement the Junta of National Reconstruction transmitted to the Organization of American States to hold that Nicaragua was legally bound by the statement. The court declined to so hold.²³² In *Frontier Dispute*,²³³ the Court declined the request to apply the rule to hold Mali bound by the declaration made by Mali's Head of State on 11 April 1975.

The Court used the opportunity provided by the latter cases to restate the essential ingredients of the rule. The Court made it clear that the acceptable form of unilateral statements must comprise a “formal offer which if accepted would constitute a promise in law, and hence a legal obligation”. Also that the commitment contained in the statement must be of a legal nature.²³⁴ The Court has also been emphatic in stating that though unilateral declarations may

²²⁹ *New Zealand v. France*, note 227, p. 472 para 46; *Australia v. France* note 227, p. 267 para. 43. In the view of the Court, by the statements, France conveyed to the world at large, its intention to effectively terminate atmospheric nuclear tests. (p. 474, Para 53)

²³⁰ Note 228

²³¹ Note 40. Although the Court did not refer to the *Nuclear Tests Cases* in its majority decision, the cases featured prominently in the Dissenting Opinion of Judge Schwebel (pp. 259-527).

²³² *Ibid*, p. 132, Para 261

²³³ (*Burkina Faso v. Mali*), ICJ Rep 1986, 554

²³⁴ See *Ibid*

be treated as an undertaking *erga omnes*, such declarations must be regarded with “greater caution” when the declaration is not directed at any particular recipient.²³⁵

7.7.3 The Liability of States for the Activities of Armed Militias

States are abstract entities: they have neither souls to be damned nor bodies to be kicked;²³⁶ the liability of States must be sought in the directing minds and will of States, which are then fictionally transplanted to the State as acts of the State. The act of state doctrine attributes to a State only the activities of individuals and or organs which authorities are recognised by the internal law of the State. Such officers have been narrowly defined by international law for the purpose of holding the State liable for their acts.²³⁷

The ICJ has sought to extend the act of state doctrine beyond its traditional frontiers. This reformation began in the *Nicaragua case*, where Nicaragua urged the Court to hold the United States directly responsible for the activities of the anti-Nicaraguan government group (the Contras), in the territory of Nicaragua. Nicaragua had argued that:

The *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offences which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. In the view of Nicaragua, "*stricto sensu*, the military and paramilitary attacks launched by the United States against Nicaragua do not constitute a case of civil strife. They are essentially the acts of the United States." If such a finding of the imputability of the acts of *the contras* to the United States were to be made, no question would arise of mere complicity in those acts, or of incitement of the *contras* to commit them.²³⁸

The difficulty with Nicaragua's contention was that the Contras was an armed opposition group which was neither an organ of the U.S nor based in the U.S, and for which conduct the

²³⁵ *Ibid*, 573-574, para. 39-40

²³⁶ To borrow the words of Edward, First Baron Thurlow cited in John C Coffee, Jr, "No Soul To Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment", 79 Mich L. Rev, 386, 386 (1980-1981)

²³⁷ See *Arrest Warrant case*, note 217

²³⁸ Note 40, p. 64, para 114

United States could not be held responsible under existing rules of international law. To resolve the difficulty, the Court formulated the control and dependent test as a new basis for state responsibility for the activities of non-state actors within the borders of another State. The Court has, however, said that there must be “complete dependence”²³⁹ on the State for the activities called in question for that State to be internationally responsible.

When the question arose again in the *first Genocide case*,²⁴⁰ the Court simply resorted to the rule it adopted in the *Nicaragua case*,²⁴¹ declaring that:

according to the Court’s jurisprudence, persons, groups of persons or entities may, for purposes of international responsibility, be equated with State organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in “complete dependence” on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing to act through persons or entities whose supposed independence would be purely fictitious.²⁴²

Through these cases the Court established a rule to deal with situations where the international liability of a State cannot be directly implicated in armed intervention for which it has complicity.

In this chapter, the writer has so far argued, not only that the Court engages in judicial lawmaking, but also discussed guises employed by the Court for judicial lawmaking while still maintaining the convenience of stating that judges do not make law. In the course of the discussion, the writer has touched on several vital areas connected to judicial lawmaking. These include *non liquet* and the *Lotus presumption*. The writer also mentioned specific legal concepts which have been developed by the Court.

²³⁹ *Ibid*, p. 393

²⁴⁰ Note 80

²⁴¹ *Ibid*, p 140-141, para 391

²⁴² *Ibid*, p 205, para 392

In concluding this chapter, the writer wishes to restate his view that the Court exercises a residual lawmaking function wherever the resolution of a legal question before it necessitates the creation or development of a new rule/principle of international law. The writer is not under any illusion that this view will have a general appeal in view of the entrenched view that the Court cannot make laws. On the other hand, in view of the fact that the views expressed above, no matter how liberal they seem, are backed by the actual practice of the Court, the writer is hopeful that the views would have considerable academic appeal.

Chapter Eight

Conclusion

Through the foundation established in chapters one and two, the writer was able to establish by an extensive discussion of the text of articles 38 and 59, particularly as espoused in the case-law of the Court in chapters three to six, that rules/principles in judicial decisions are applied by the Court as rules/principles of international law. The writer found this approach to be in consonance with the intentions garnered from the preparatory work. To further strengthen the tenability of the views expressed in chapter two to six, the writer dedicated chapter seven to specific aspects of judicial legislation by the Court. The writer extensively discussed the case-law of the Court as it relates to *non-liquet* and judicial lawmaking.

From the writer's analyses, the following conclusions, which reinforce themselves in the preparatory work of the Statute and the practice of the Court, are evident:

1. That judicial decisions are a source of international law, not only for the Court but also for States that appear before it;
2. That judicial decisions in article 38(1)(d) was intended to be used as a source of law, failing all the other sources. And that the importance of judicial decisions in this regards reveals itself in decided cases of the Court;
3. That the real question is not whether the Court has adopted *stare decisis*, it is whether rules/principles enunciated in the decisions of the Court have continuously been applied to States and accepted as rules/principles of international law;

4. That the making of article 59 and its application by the Court does not reveal it as preclusive of judicial decisions as a source of law. Its real connection being with third party intervention and the protection of third party rights from decisions and not principles underpinning the decision in individual cases.
5. That there is no room for *non liquet* in the contentious jurisdiction of the Court, and no less so in its advisory jurisdiction.
6. That the incompleteness of international law does not result in *non liquet*, because the sources open to the application of the Court are complete in virtue of articles 38(1)(c) and (d).
7. That while arguing that it is difficult to precisely say whether the Court regards itself bound by its precedent, it is indisputable that the Court does not ignore rules/principles enunciated in its precedent. Principles, which the Court indisputably regards as binding on it and on litigating States, so long as the ground upon which they were based have not lost legal credibility. It must, however, be admitted that there have been the situations, where the coherency of the case-law of the Court was disrupted by some extra-legal factors mentioned in the body of this work.
8. In consequence of the foregoing, the Court makes a law for the parties in every case it decides. And each decided case has legal implications for other States, as the law they contain establishes a situation at law; a situation which neither the Court nor States are not in the habit of ignoring.

In the final analysis, while the writer cannot claim to have exhausted all the aspects of the debate, the writer is, however, confident that the much he has done would render articles 38 and 59 much more amenable to the proper understanding of the role of the ICJ in the making

of international law. Indeed this work stands out as one of the few English works that fully dedicates to understanding the authority of judicial decisions in article 38(1)(d) and their relationship to article 59, from the making of the provisions through the practice of the Court and of States relating to them. The writer's extensive discussion of the preparatory work of the provisions in chapter two challenges some factual inaccuracies in some texts as well as gives the reader a more conducive platform for assessing the relevance of article 38(1)(d) in the formation and development of international law. On the whole, not unmindful of the fact that text writers generally express the contrary view, the writer is justified in the view taken in this thesis by the robust case-law of the Court; the revelation from the preparatory work of the Statute and, of course, the works of the few text writers sharing the same view.

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